Review of

REPRESENTATION AGREEMENTS AND ENDURING POWERS OF ATTORNEY

Undertaken for

the Attorney General of the Province of British Columbia

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February 15, 2002

THE PERIOD FOR SUBMISSIONS HAS NOW ENDED.
THANK YOU FOR YOUR FEEDBACK.

REVIEW OF REPRESENTATION AGREEMENTS AND ENDURING POWERS OF ATTORNEY

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PREFACE

The principal question that had to be considered in this review was what type of instrument or instruments should be available to those British Columbians who, while they are still capable, wish to make arrangements for how their financial affairs are to be dealt with should they become incapable.

It is recommended that the enduring power of attorney should be the only instrument that may be used for that purpose. Representation agreements made under the authority of the *Representation Agreement Act* should be confined to making provision for personal affairs in the case of incapacity, with the exception of agreements that may be made under section 7 of that Act.

The reasons for the recommendation are discussed in Chapters II and III. On the assumption that it is implemented, a number of specific recommendations are made on enduring powers of attorney in Chapter IV, and recommendations for further consequential changes, including recommendations on the *Representation Agreement Act*, are made in Chapter V.

The specific recommendations are listed immediately after this Preface so there is no need to provide a summary of them here. Some of the recommendations recommend that no action be taken on particular matters. These are generally matters that are dealt with in the legislation in other Canadian jurisdictions, or are discussed in Law Reform Commission Reports. It seemed useful to indicate why, in relation to them, it is suggested nothing should be done.

The recommendations dealing with enduring powers of attorney are designed to reflect the fact that the enduring power is used when the maker becomes incapable. By definition, there is no common law dealing directly with that state of affairs because powers of attorney terminated on the maker becoming incapable. The recommendations are rarely prescriptive (that is, they do not impose obligations requiring that certain things be done or that they be done in a specific way). Rather in some cases their aim is to provide default provisions if the power is silent, in others to assist in the administration of a power or the enforcement of an attorney's obligation.

In accordance with the terms of reference for the review, the philosophy behind and the general structure of the *Representation Agreement Act* have been taken as given in respect of arrangements for personal affairs. In general, the changes that have been recommended are designed to assist in the administration of representation agreements. The one exception to that is the recommendation that the requirements for the execution of representation agreements be simplified so that they are almost, but not quite, the same as those for enduring powers of attorney. Much of Chapters II and III deals with the execution of instruments making provision for how decisions are to be made should the maker of an instrument become incapable of making decisions. The conclusions reached there, if accepted, apply equally to enduring powers of attorney and representation agreements.

Finally, it should also be noted that the review was concerned only with arrangements that individuals make for how their affairs are to be handled in the event of incapacity. It does not therefore deal with the status of *Patients Property Act* and of its as yet unproclaimed successor, Part 2 of the *Adult Guardianship Act*. The status of those two pieces of legislation is perhaps something which should now be considered.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

(1) Except for agreements made under section 7 of the *Representation Agreement Act*, the enduring power of attorney should be the sole instrument available for making advance arrangements for the management of a person's financial affairs in anticipation of possible incapacity.

(2) The *Representation Agreement Act* should be amended to remove from it all references to financial affairs, other than those necessary to accommodate the continued existence of section 7.

(3) If those recommendations are accepted, consideration should be given to the implementation of Recommendations 2-25 in Chapter IV and Recommendations 26-39 in Chapter V.

N.B. In recommendations 2-25, a reference to the "Act" is to the *Power of Attorney Act*.

RECOMMENDATION 2

The Act be amended by repealing section 8 and by:

(1) inserting a definition of an enduring power of attorney. This would provide that an enduring power is one that is created in accordance with the provisions of the Act and that provides that the authority of the attorney is to continue despite any mental incapacity of the donor;

(2) by providing that a power that falls within the definition is not terminated solely by the subsequent mental incapacity of the donor.

RECOMMENDATION 3

No provision be made in the Act on the required age for making enduring powers of attorney.

RECOMMENDATION 4

A section be added to the Act providing:

(1) that a person has capacity to grant an enduring power of attorney if he or she understands the nature of the authority created by the power and the consequences of giving it to the attorney;

(2) that a person shall be presumed to have the capacity to grant a enduring power of attorney unless the contrary is established.

RECOMMENDATION 5

No provision be included in the Act placing restrictions on who may be appointed as an attorney under an enduring power of attorney.

RECOMMENDATION 6

Section 17 (2) (f) of the *Community Care Facilities Act*, R.S.B.C. 1996, c. 60, be retained, but that it be amended so that:

(1) The prohibition on appointments is extended to appointments by former residents;

(2) The power to declare a power or a disposition valid be vested in the courts and not the Public Guardian and Trustee.

RECOMMENDATION 7

No provision be made in the Act requiring that there be at least two attorneys in the case of an enduring power of attorney.

RECOMMENDATION 8

(1) The Act be amended to provide that where under an enduring power of attorney there are two or more joint attorneys, and one dies, resigns, becomes incompetent to act, is unwilling to act, or is unavailable to act, is removed by the court or otherwise ceases to act, the remaining attorney or attorneys, subject to any contrary intention in the instrument, may continue to act.

(2) There is no need for amendments dealing with;

(a) a presumption as to appointments being joint or successive. If there was to be legislation it should provide that appointments are presumed to be joint;

(b) the requirement of unanimity on the part of joint attorneys. If there was to be legislation, it should affirm the common law unanimity rule.

RECOMMENDATION 9

(1) Subject to the amendments to the Act recommended in (2), (3), and (4), no change be made in the requirements for the execution of a enduring power of attorney.

(2) A person may sign on behalf of a donor if;

(a) the donor is physically incapable of signing;

(b) the donor directs that the other person sign on his or her behalf and the person sign in the presence of the donor;

(c) the signature is witnessed as if the donor were signing;

(d) the following persons do not sign for the donor: the attorney, the attorney's spouse, a witness, any person prohibited from acting as a witness.

(3) The following persons should be prohibited from acting as a witness: the attorney; the attorney's spouse; a person who signs for the donor and that person's spouse; the donor's spouse and children.

(4) The execution requirements should apply to variations of power..

RECOMMENDATION 10

Provision, modelled on sections 5 and 6 of the Alberta *Powers of Attorney Act*, be made in the Act for springing powers.

RECOMMENDATION 11

The Act should be amended to provide that an enduring power of attorney may confer on an attorney the authority to do anything on behalf of the donor that a donor can lawfully do by attorney.

RECOMMENDATION 12

The Act be amended to provided that, subject to a contrary intention appearing in the instrument, an attorney under an enduring power of attorney should have the authority to provide for the maintenance, education, benefit and advancement of the donor's spouse and dependant children, including the attorney if he or she is a spouse or dependant child. The power would however be subordinate to the obligation to make appropriate provision for the principal.

RECOMMENDATION 13

No provision should be made in the Act authorizing an attorney to make gifts, including gifts to charity.

RECOMMENDATION 14

The Act should set out the following duties of the attorney under an enduring power of attorney, with a proviso that they not be regarded as an exclusive list, and with a proviso, as indicated, as to whether the duty may be varied or excluded by the power;

(1) Duties that may not be excluded by the power:

(a) to act honestly and in good faith;

(b) to act within the authority given by the instrument;

(c) to keep accounts and other records concerning the exercise of the attorney's powers (but the instrument may provide for the manner and detail in which accounts and records are kept);

(2) Duties that may be excluded or varied by the power:

(a) to act solely in the best interests of the donor, subject to any power to provide for a spouse or dependant child;

(b) to adhere to the appropriate standard of care. There is, it seems, at common law, a difference between what is expected of the unremunerated and remunerated attorney, and that should be reflected in the legislation. Section 32 (7), (8) of the Ontario *Substitute Decisions Act* provides a model. It states that an unpaid attorney "shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs"; a paid attorney " the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise".

(c) not to benefit personally from the position of attorney or from the exercise of the power, nor to confer any benefit on any other person than the donor. This would be subject to any statutory power to benefit the spouse and children of the donor;

(d) not to delegate any authority conferred by the instrument or arising as a matter of law;

(e) to keep the donor's and the attorney's assets separate, except to the extent that is impossible because both have an interest in the same asset.

RECOMMENDATION 15

The Act should be amended to provide that, subject to a contrary intention in the instrument, in the case of an enduring power of attorney, an attorney should be under a duty to act if he or she has acted under the power or has otherwise accepted the appointment, and has reasonable grounds to believe that the donor is incapable of managing his or her affairs.

RECOMMENDATION 16

There is no need for a provision requiring an attorney under an enduring power of attorney to provide periodically accounts to a specified person.

RECOMMENDATION 17

In relation to enduring powers of attorney, section 17(1) of the *Public Guardian and Trustee Act* be amended to provide:

(1) If the Public Guardian and Trustee has reason to believe that the donor is or may be incapable and that a breach of duty by an attorney has or may have taken place, is or may be occurring, or may take place, the Public Guardian and Trustee may take such action as he or she in his or her discretion sees fit, including the carrying out of a formal investigation;

(2) If the Public Guardian and Trustee concludes that there is a breach of duty he or she may apply to court for any order within the court's jurisdiction.

RECOMMENDATION 18

The Act be amended to provide:

(1) A person who in good faith lodges a complaint relating to an enduring power of attorney with the Public Guardian and Trustee shall not, simply because of the lodging of the complaint, be subject to liability;

(2) A person who in good faith lodges a complaint relating to an enduring power of attorney with the Public Guardian and Trustee shall not be subject to liability for disclosing confidential information if the lodging of the complaint requires the disclosure of that information.

RECOMMENDATION 19

The Act be amended to provide that the Public Guardian and Trustee, an interested party or any other party with leave of the court may apply to court for an accounting with respect to an enduring power of attorney, provided that the court shall have jurisdiction to entertain the application only if there is reason to believe the donor is incapable of managing his or her affairs.

RECOMMENDATION 20

The Act be amended to provide that an enduring power of attorney terminates on:

(1) the donor, while capable, delivering a written notice of revocation to the attorney or attorneys;

(2) the donor, whether capable or incapable, becoming bankrupt;

(3) subject to the terms of the power, the breakdown of the marriage of the donor (whether the donor is capable or incapable) if the spouse of the donor is the attorney;

(4) the death of the donor.

RECOMMENDATION 21

(1) The Act be amended to provide that in the case of an enduring power of attorney:

(a) While the donor is capable an attorney may renounce or resign an appointment by delivering a written notice of renunciation or resignation to the donor;

(b) If the donor is incapable and the attorney has not acted or otherwise indicated acceptance of the appointment the attorney may renounce or resign by delivering a written notice of renunciation of resignation to (i) any remaining attorney, or (ii) if there is no remaining attorney to a parent, spouse, adult child or adult sibling of the donor, or (iii) if there are no such persons or they cannot be located, to the Public Guardian and Trustee;

(c) If the donor is incapable and the attorney has acted or otherwise indicated an acceptance of the appointment the attorney may resign only with leave of the court.

(2) The *Patients Property Act* be amended to provide that if a donor of an enduring power of attorney is incapable of managing his or her financial affairs, an attorney ceases to act and there is no continuing attorney, the court on application may appoint a new attorney, or appoint a committee, the procedure on the application to be the same as that in the *Patients Property Act*.

RECOMMENDATION 22

The *Patients Property Act* should be amended to provide:

(1) When a court makes an order under section 1(b) of the Act that a person is incapable of managing his or her affairs, the court may, on application:

(a) terminate an enduring power of attorney and appoint a committee;

(b) remove an attorney under an enduring power of attorney and appoint a successor.

(2) On an application to appoint a committee the court should have the power to remove an attorney and appoint a successor; and, on an application to remove an attorney and appoint a successor, the power to appoint a committee.

(3) If a person is declared to be incapable of managing his or her affairs in a certificate issued pursuant to section 1(a) of the Act, any enduring power of attorney that may be in existence is suspended and the Public Guardian and Trustee becomes the committee. If it is subsequently determined that a valid enduring power of attorney exists, the committeeship of the Public Guardian and Trustee terminates, unless the Public Guardian and Trustee determines that it is necessary or desirable that the committeeship continue. In that case, the enduring power of attorney is terminated.

RECOMMENDATION 23

Sections 3 and 4 of the Act should be amended so that:

(1) they cover (in addition to termination) the situation where a power is, in whole or in part: (i) initially invalid, by reason of incapacity, improper execution, or otherwise; (ii) varied; or (iii) suspended;

(2) so far as gratuitous transfers by an agent is concerned, the donor of a power of attorney be entitled to restitution from the transferee, subject to any defences that would normally be available to a transferee to whom a transfer has been made by mistake.

RECOMMENDATION 24

The Act be amended to provide that in the case of enduring powers of attorney, an attorney, a person entrusted with the personal care of the donor, the Public Guardian and Trustee and, with the leave of the court, any other person may apply to court for advice and directions, the provisions to be modelled on those in sections 86 and 87 of the *Trustee Act*.

RECOMMENDATION 25

The Act be amended to confer on the courts a jurisdiction to relieve an attorney under an enduring power of attorney from liability similar to the jurisdiction in section 96 of the *Trustee Act* to relieve a trustee from liability.

RECOMMENDATION 26

(1) Section 13 of the *Representation Agreement Act* be amended to provide that a representation agreement is validly executed if it is:

(a) in writing;

(b) signed by the adult in the presence of one witness;

(c) signed by the witness in the presence of the adult;

(d) signed by the representative or representatives, who need not sign in the presence of any other person and whose signature need not be witnessed;

(e) signed by the monitor, if a monitor is appointed.

(2) The provisions on the preparation of certificates by witnesses, representatives, monitors, and the requirement for consultation with a lawyer or other prescribed person be deleted from the Act.

(3) In amending section 13, the following sub-sections be retained: (3.1), (4), except for paragraph (d); (5); (5.1); (7).

RECOMMENDATION 27

(1) The *Representation Agreement Act* be amended to remove from it all references to financial matters, except for those references that need to be retained because of section 7.

(2) The reference to legal matters in section 7 should be confined to matters referred to in section 7 and section 9.

(3) Section 2 (1) (v) of B.C. Reg. 199/2001 should be deleted.

(4) Paragraphs (f) and (g) should be deleted from section 9.

(5) Sections 2 and 3 should be changed so that it is clear that the references to financial affairs are to matters falling within section 7.

RECOMMENDATION 28

The *Representation Agreement Act* be amended to provide that, subject to a contrary intention in the agreement, a representative comes under a duty to act only if the representative has reasonable grounds to believe that the adult is incapable of making decisions.

RECOMMENDATION 29

(1) All of the powers of investigation of the Public Guardian and Trustee with respect to representation agreements should be consolidated either in the *Public Guardian and Trustee Act* or in the *Representation Agreement Act*. The Act which does not contain the powers should contain a cross-reference to the Act that does.

(2) The legislation should provide that a person may make an objection to the Public Guardian and Trustee alleging any of the matters currently set out in section 30(1) of the *Representation Agreement Act*.

(3) The legislation should provide that objections may not only allege that a breach of duty has occurred or is occurring, but that a breach of duty is about to take place.

(4) The legislation should provide that if the Public Guardian and Trustee has reason to believe that an adult is or may be incapable and that an impropriety of the nature currently listed in section 30 of the *Representation Agreement Act* exists, the Public Guardian and Trustee may take such action as he or she in his or her discretion sees fit, including the carrying out of a formal investigation.

(5) It should be made clear that the powers available under sections 18 and 19 of the *Public Guardian and Trustee* are available to the Public Guardian and Trustee in conducting an investigation with respect to a representation agreement.

RECOMMENDATION 30

The *Representation Agreement Act* should be amended so that it provides to persons making objections to the Public Guardian and Trustee the same protection as is recommended in Recommendation 18 for those who lodge complaints in the case of enduring powers of attorney.

RECOMMENDATION 31

The *Patients Property Act* should be amended to make similar provisions for representation agreements as are recommended for enduring powers of attorney in Recommendation 22.

RECOMMENDATION 32

(1) A new section should be added to the *Representation Agreement Act* dealing with the position of representatives and third parties in relation to financial matters when an agreement is invalid, is not in effect, or has been varied, suspended or terminated. The section should modelled on the recommendations made in Recommendation 23.

(2) Section 24 of the *Representation Agreement Act* should be amended so that:

(a) the section applies only to non-financial matters;

(b) the section applies not only when an agreement is not in effect or is invalid, but when an agreement has been varied, suspended or terminated; and it should be made clear that invalidity covers invalidity for any reason and not simply for improper execution;

(c) knowledge of the representative and the third party should be defined as recommended in Recommendation 23.

RECOMMENDATION 33

Section 34 (2) of the *Representation Agreement Act* be repealed and replaced by provisions applying to applications made by representatives modelled on sections 86 and 87 of the *Trustee Act*.

RECOMMENDATION 34

A section should be added to the *Representation Agreement Act* conferring on the courts a jurisdiction to relieve a representative from liability similar to the jurisdiction under section 96 of the *Trustee Act* to relieve a trustee from liability.

RECOMMENDATION 35

The *Representation Agreement Act* and the *Power of Attorney* Act be amended to provide that if two or more instruments, be they powers of attorney, enduring powers of attorney or representation agreements, confer, in whole or in part, the same authority on different persons, it shall be presumed that all the instruments are valid, unless there is an express provision to the contrary in or more of the documents or unless a contrary intention may be drawn by necessary implication from all the circumstances.

RECOMMENDATION 36

The *Power of Attorney Act* should be amended to provide:

(1) The presumption as to capacity referred to in Recommendation 4(2) applies to enduring powers of attorney created before, on or after the day any legislation enacting the presumption comes into force.

(2) Any new provisions on execution apply to the creation of enduring powers of attorney created on or after the day the provisions come into force; and apply to the variation of an enduring power of attorney whether it was created before, on or after that day.

RECOMMENDATION 37

The *Community Care Facilities Act* should be amended to provide that any prohibition on former residents of community care facilities appointing as an attorney under an enduring power any of the persons referred to in section 17 (2) (f) of the *Community Care Facilities Act* should apply only to enduring powers created on or after the day the legislation providing for the prohibition comes into force.

RECOMMENDATION 38

If Recommendation 12 is implemented, it should apply only to enduring powers of attorney created on or after the day on which the legislation implementing the recommendation comes into force.

RECOMMENDATION 39

If Recommendation 26 be implemented, the *Representation Agreement Act* be further amended to provide with respect to agreements that were made before the legislation implementing the legislation comes into force:

(1) if an agreement was invalid solely because of a defect of execution, it shall be deemed to have been valid from the date of its creation if it would have been validly executed under the process recommended in Recommendation 26;

(2) an agreement may be changed by an instrument validly executed under the process recommended in Recommendation 26, even if the agreement was made before any legislation implementing Recommendation 26 comes into force.

RECOMMENDATION 40

That it be provided in the *Representation Agreement Act* that the Act shall continue to apply to all representation agreements, including those dealing with financial affairs, entered into before any legislation implementing Recommendation 27 comes into force.

LIST OF ABBREVIATIONS

1. LEGISLATION

(a) British Columbia

ABBREVIATION	REFERENCE
Patients Property Act	*Patients Property Act*, R.S.B.C. 1996, c. 349, as amnd.
Power of Attorney Act	*Power of Attorney Act*, R.S.B.C. 1996, c. 370, as amnd.
Representation Agreement Act	*Representation Agreement Act*, R.S.B.C. 1996, c. 405, as amnd. S.B.C. 1999, c. 25; S.B.C. 2000, c. 24; S.B.C. 2001, c. 2
Trustee Act	*Trustee Act*, R.S.B.C. 1996, c. 464
Land Title Act	*Land Title Act* R.S.B.C., 1996, c. 250, as amnd.

(b) Other Canadian Jurisdictions

ABBREVIATION	REFERENCE
Alberta Act	*Powers of Attorney Act*, S.A. 1991, c. P-13.5, as amnd. S.A. 1996, c. P-403, S. 40; S.A. 2000, c.20, s. 58.; R.S.A. 2000, c. P-20
Manitoba Act	*The Powers of Attorney Act*, S.M. 1996, c. 62, C.C.S.M., c. P-97
New Brunswick Act	*Property Act*, R.S.N. B. 1973, c. P-19, as amnd., ss. 56-58.6
Nova Scotia Act	*Powers of Attorney Act*, R.S.N.S. 1989, c. 352
Ontario Act	*Substitute Decisions Act*, 1992, S. O 1992, c. 30, as amnd.
P.E.I. Act	*Powers of Attorney Act*, R.S.P.E.I. 1988, c. P-26, as amnd.
Saskatchewan Act	*The Powers of Attorney Act*, 1996, S.S. 1996, c. P-20.2

2. LAW REFORM REPORTS AND PAPERS

ABBREVIATION	REFERENCE
Alberta Discussion Report	Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report for Discussion, No. 7, 1990)

Alberta Report	Alberta Law Reform Institute, *Enduring Powers of Attorney* (Report No. 59, 1990)
Australian Report	Australian Law Reform Commission, *Enduring Powers of Attorney* (Report No. 47, 1988)
B.C. Report (1975)	Law Reform Commission of British Columbia, *Law of Agency, Part 2: Powers of Attorney and Mental Incapacity* (Report No. 22, 1975)
B.C. Report (1990)	Law Reform Commission of British Columbia, *The Enduring Power of Attorney: Fine-Tuning the Concept* (Report No. 110, 1990)
CBA B.C. Report	Canadian Bar Association, B.C. Branch, Wills and Estates Subsection Sub-Committee, *Enduring Powers of Attorney* (1988)
English Working Paper	English Law Commission, *The Incapacitated Principal* (Working Paper No. 69, 1976)
English Report	English Law Commission, *The Incapacitated Principal* (Report No. 122, 1983)
Manitoba Report (1974)	Manitoba Law Reform Commission, *Special Enduring Powers of Attorney* (Report No. 14, 1974)
Manitoba Report (1994)	Law Reform Commission of Manitoba, *Enduring and Springing Powers of Attorney* (Report No. 83, 1994)
Newfoundland Report	Newfoundland Law Reform Commission, *Enduring Powers of Attorney* (Report No. 2, 1988)
Ontario Report	Ontario Law Reform Commission, *Report on Powers of Attorney* (1972)
Nova Scotia Report	Law Reform Commission of Nova Scotia, *Enduring Powers of Attorney* (Final Report, 1999)
Saskatchewan Consultation Paper	Law Reform Commission of Saskatchewan, *Consultation Paper on Enduring Powers of Attorney* (2001)
Tasmania Report	Law Reform Commission of Tasmania, *Powers of Attorney* (Report No. 39, 1984)

I. SCOPE OF THE REVIEW

A. INTRODUCTION

The background to the Review and its Terms of Reference are set out in a document provided by the Department of the Attorney General entitled " Terms of Reference Review of Representation Agreements and Enduring Powers of Attorney." The document is set out as Appendix A. This Chapter deals more fully with the background and Terms of Reference.

B. BACKGROUND

1. Introduction

Many people wish, while they are capable, to be able to make provision for how decisions on their personal affairs and on their financial affairs will be made should they become incapable of making those decisions themselves. The phrase "personal affairs" is used here to cover such matters as where people live, the standard of living they enjoy and the health care they receive. "Financial affairs" refers to both personal finances and the carrying on of business and other commercial activities. Personal affairs and financial affairs cannot of course be totally separated, but this review, as will be explained below, deals primarily with financial affairs.

The arrangements that are made in anticipation of incapacity will inevitably mean conferring on another person the authority to make, or to assist in the making of, decisions. Two of the instruments that may be used for that purpose are representation agreements and enduring powers of attorney. A representation agreement, which may deal with both personal and financial affairs, may be made under the *Representation Agreement Act*. In the Act, the person conferring the authority is referred to as the "adult", the person on whom the authority is conferred as the "representative". One can also, pursuant to the *Power of Attorney Act*, use an enduring power of attorney, but only for financial affairs. The person conferring the authority is then referred to as the "donor", the person on whom the authority is conferred as the "attorney."

On occasion, it will be necessary to deal with representation agreements and enduring powers at the same time. They will then be referred to as the instrument, the adult and the donor as the principal and the representative and the attorney as the agent.

2. Enduring powers of attorney

The enduring power of attorney is a creature of statute. Its predecessor was the common law power of attorney. That instrument was, however, of little value in the circumstances we are considering. First, it either could not be used at all to give directions on personal affairs, or at best it was very doubtful that it could be used for that purpose. Second, while it could be used to provide for financial matters, as a matter of law it ceased to be valid once the donor became incapable. Because the power terminated as a matter of law, a donor could not provide that it continued to be valid after the donor became incapable. Thus, the common law power of attorney ceased to operate at the very moment the donor wished and needed it to operate.

Canadian Law Reform Commissions began considering ways of dealing with the second of these deficiencies in the 1970s; see Ontario Report; Manitoba Report (1974); B.C. Report (1975).

The issue was eventually taken up by the Uniform Law Conference of Canada (See Proceedings 1975, 265, Appendix Z; 1976, 32, Appendix T; 1977, 31; 1978, 33, 236, Appendix O.) The Conference noted that there was a general consensus that the way to proceed was to permit donors to create what came to be known as enduring powers of attorney. This could be done by changing the law to enable donors to specifically provide that a power of attorney would continue to be valid, despite the fact that after its creation the donor became incapable. However, as the Conference also noted, on matters of detail the Reports differed markedly, and indeed in some cases were incompatible (Proceedings, 1976, 205; and see the summary B.C. Report (1975), 15-18).

One matter on which there were differences of opinion was on the formalities that had to be followed in the creation of an enduring power. All three Law Reform Commissions agreed that, in order to create a valid enduring power, it should be in writing, signed by the donor, witnessed and dated, and should provide that the power was to continue in effect after the donor became incapable. The major difference arose on the number of, and who could, or could not, be a

witness. British Columbia recommended there be a witness, but if there was not then the power could take effect as an ordinary power. Ontario would have required one witness, but excluding the attorney or the attorney's spouse. Manitoba would have required two witnesses. It would have excluded the attorney and the attorney's spouse, prohibited more than one member of the donor's family from being a witness, and required that one of the witnesses be a physician, surgeon, barrister or solicitor. The witnesses would have been required to draw up an affidavit stating they knew the donor, they had reason to believe the donor and the person signing were one and the same, that the donor appeared to be of sound mind and to understand the document being executed.

Eventually, the Conference adopted a statute that provided for the minimum of formality. It required that an enduring power be in writing, signed by the donor and that the donor's signature be witnessed by a witness who could not be the attorney or the attorney's spouse; and that the instrument provide that the power was to continue notwithstanding any incapacity of the donor. It did not however make any reference to the filing requirements discussed in the Manitoba and Ontario Reports.

Beyond matters of creation, the statute did not deal with the capacity needed to create an enduring power, with the terms that might be included in it, or the mode of enforcement of an attorney's obligation (again ignoring recommendations on the latter topic in the Manitoba and Ontario Reports). The assumption was made that the common law rules that applied to ordinary powers would apply to enduring powers. Donors would be considered capable of making a power if they understood the nature of the instrument and the consequences of granting to the attorney whatever authority it conferred. As a general principle, donors could include in a power any terms they saw fit. The prime means of enforcing the duties of a recalcitrant attorney would be primarily by court action.

Legislation based on the Uniform Act was enacted in British Columbia in 1979; see *Attorney-General Statutes Amendment Act 1979*, S.B.C. 1979, c. 2, s. 52. The authority to create enduring powers is now to be found in section 8 of the *Power of Attorney Act*.

3. Representation agreements

The *Representation Agreement Act* was passed in 1993 (S.B.C. 1995, c. 67). It was one of four statutes enacted in that year, generally referred to collectively as the "adult guardianship legislation". (The other statutes were: *Adult Guardianship Act*, S.B.C. 1993, c. 35, see now R.S.B.C. 1996, c.6; *Health Care (Consent) and Care Facility (Admission) Act*, S.B.C. 1993, c. 48, see now R.S.B.C. 1996, c.181; *Public Guardian and Trustee Act*, S.B.C. 1993, c. 64, see now R.S.B.C. 1996, c.383.) The legislation was developed through a unprecedented broad based community-government collaboration.

In the 1980s various groups, both outside and inside government, worked on developing changes in adult guardianship law. In 1989 a number of individuals, community groups and service groups joined together to form a coalition, The Project to Review Adult Guardianship. The coalition engaged in research, developed proposals and advocated for reform. At about the same time a parallel inter-ministry government working group was set up. Eventually community and government formed a Joint Working Committee on Adult Guardianship. In the spring of 1992, the Joint Committee released a discussion paper, *How Can We Help*. This was based on extensive public discussion, and on the work of a small joint working committee and various working groups, which focussed on specific issues. Further consultation was then held around the province. In the fall of 1992, a second version of *How Can We Help* was published. It contained recommendations for legislation, which were submitted to and accepted by government.

The four statutes referred to above were passed in 1993, but did not come into force until 2000, and even then were not proclaimed in full. The delay (in itself a long story) and how the three Acts other than the *Representation Agreement Act* have fared since they came into force is not directly germane to this Review. So far as the *Representation Agreement Act* is concerned, it, like the other Acts, was not brought into effect in full (the most significant omission being the non-proclamation of the provisions on a register of representation agreements). Moreover, the Act has been extensively amended since it was first enacted.

Two types of agreements may be created under the Act. Section 7 permits an adult to confer on a representative the power to assist the adult in making, or the power to make for the adult,

decisions on the matters listed in section 7 (1). In general terms, these matters are personal care, routine management of financial affairs, specified health care and the obtaining of legal services. Under section 9, a representative may, again in general terms, be given a much broader range of authority, encompassing a wide range of personal affairs and the power to do anything in relation to financial affairs that an attorney may be authorized to do (generally thought to be anything other than make a will).

In order to make a section 9 agreement, an adult must understand the nature of the authority and the consequence of conferring it on the representative. Section 8 (1) provides that an adult may make a section 7 agreement even though the adult is incapable of making a contract or managing his or her personal or financial affairs, and section 8 (2) lists four factors that must be taken into account in deciding if the adult is incapable. The section does not set out in positive terms the degree of capacity required. Section 9.1 provides that neither type of agreement becomes invalid solely because the adult may become incapable of making a representation agreement conferring the type of authority originally given.

Section 13 (1) sets out a list of formalities that must be complied with for either type of agreement to be validly created. These, as we shall see, are more complex than the formalities that must be observed in the case of enduring powers of attorney. Section 9 (2) provides that in the case of a section 9 agreement, the adult must also consult a lawyer or a member of a prescribed class, and the person consulted must prepare a certificate in the prescribed form.

The Act also contains provisions that limit to some degree the terms that may be included in an agreement, and provisions that may serve to ensure the representative carries our his or her duties, for example the appointment of a monitor.

As will be seen, from this short summary, with respect to financial affairs representation agreements and enduring powers of attorney perform the same function. Both enable a principal to confer a narrow or broad range of authority on an agent, and both may continue to be effective even if the principal becomes incapable after the instrument is drawn up. It is not surprising therefore that, contemporaneously with the coming into force of the *Representation Agreement Act*, it was intended section 8 of the *Power of Attorney Act* be repealed; *Representation Agreement Act*, S.B.C. 1993, c. 67, s.61.

The legislation repealing section 8 has not yet been proclaimed in force. The government announced in June 1999 that it was intended to repeal the section as of September 1, 2000, in June 2000 that the repeal would be as of September 1, 2001 and in April 2001 that it would be as of September, 2002.

Apart from issues that might be dealt with by way of redrafting of the *Representation Agreement Act*, the hesitation in proclaiming the repealing legislation relates, in the main, to two matters:

(1) relatively speaking, the complex provisions for the creation of representation agreements as compared to the simple provisions for the creation of enduring powers, and

(2) the fact there are some limitations on the terms which may be included in a representation agreement that do not apply to enduring powers.

C. TERMS OF REFERENCE

The Terms of Reference for the Review are set out in Schedule A of the document set out in Appendix A. They speak both the process to be followed in conducting the Review, and to the substantive matters it was to deal with.

1. Process

The Terms of Reference required that there be "consultations with community advocacy groups, third parties relying on the authority of these legal instruments [Representation Agreements and Enduring Powers of Attorney], and professional organizations".

The groups and individuals with whom I met or who otherwise provided comments are listed in Appendix B. The list includes people who provided unsolicited comments. The consultations and comments were of great assistance to me and I am much indebted to all of those who either met with, or wrote to me.

The Terms of Reference also provided that consideration be given to "research and reports developed to date respecting representation agreements and enduring powers of attorney,

including the legal framework and research in other jurisdictions". Although I have consulted other material, I have relied most heavily on the materials in the List of Abbreviations (p. xx).

The original deadline for the completion of the review was December 31, 2001. As the scope of the review changed, that deadline was extended to January 31, 2002.

2. Substantive matters

The specific terms of reference need to read in light of the two sentences set out in bold on page 2 of Appendix A:

> **The fundamental policy issue is whether the two schemes should co-exist in the long term or whether the representation agreement should be the only scheme.**
>
> **Government's priority is that the law provide British Columbians with the best possible ability to plan for management of their finances and property upon incapability. British should have affordable planning instruments with appropriate safeguards.**

More specifically the terms of reference were (Appendix A, page 2):

> "Make recommendations on the future of representation agreements and enduring powers of attorney in relation to finances and property management on behalf of incapable adults.
>
> - Particularly, should there be one or two legal instruments available to BC adults.
> - If it is recommended that representation agreements be the only instruments, should there be any changes in the legislation relating to them.
> - If it is recommended that there be both representation agreements and enduring powers of attorney, should there be any changes in the legislation relating to them.

What changes should be made to the law to give effect to these recommendations, including issues as to existing legally executed documents.

What is an appropriate implementation period for any recommended transition period."

II. GENERAL CONSIDERATIONS

A. INTRODUCTION

Two sets of considerations arise out of the terms of reference:

(1) First, what factors should be taken into account in deciding what type of instrument will best enable people to provide for how their financial affairs will be administered if they become incapable? That will be discussed in this Chapter.

(2) Second, what conclusions are to be drawn from the application of those factors to enduring powers of attorney and representation agreements? That will be dealt with in Chapter III.

The first question needs to be looked at in terms of general policy and of the particular situation in British Columbia. As a matter of general policy, two matters require particular attention, the need to ensure that effect is given to the intention of the principal, and the need to protect the principal against the agent acting improperly. Taking into account circumstances in British Columbia involves looking at the opinions of those consulted, and at any reasons they had for their opinions beyond those that relate to the general policy.

This Chapter is therefore organized under the following heads:

(1) General policy;

(2) Intent;

(3) Misconduct;

(4) General policy – conclusions;

(5) British Columbia.

B. GENERAL POLICY

The basic policy objective is set out on page 2 of the document set out in Appendix A:

> "Government's priority is that the law provides British Columbians with the best possible ability to plan for the management of their finances and property upon incapability. British Columbians should have affordable planning instruments with appropriate safeguards."

This reflects a number of themes which appear in all the Reports of law reform bodies, and which have influenced legislation in the field in other jurisdictions. The only instrument available in these jurisdictions is the enduring power of attorney. Only British Columbia has representation agreements. Nonetheless, so far as fundamental policy is concerned, the same considerations apply to both types of instrument for both serve the same basic purpose. The following discussion therefore applies equally to both British Columbia instruments.

1. Freedom of choice

There is unanimity that the ideal system is one which gives to individuals the maximum freedom to make whatever arrangements they see fit to plan in advance for the possibility that they may become incapable of managing their own financial affairs. This, the Alberta Report said (2), gives people:

> "....freedom to choose someone whom they feel is most likely to act in their best interests. The sense of control over one's life after incapacity promotes self-determination and autonomy, and enhances self-dignity. It also helps to ease some of the anxiety which people feel in knowing that they may soon lose the ability to manage their affairs."

Resort to, or control by a regulatory body or by the courts, should be interventions of last resort. With respect to the Alberta *Dependent Adults Act*, the Alberta Report noted (2):

> "...there are significant problems associated with its use. The proceedings are often time-consuming and expensive, the dependent adult is merely a passive participant, and the stigma and emotional distress can be considerable...."

The same comments can be made about the *Patients Property Act*, the comparable legislation in British Columbia.

Ideally, people should be free to structure the arrangements they make to suit their own particular needs. One individual might want something intricate and complex; it would, as a consequence,

likely be expensive. Another might want something quite simple, and it is likely not to be costly. The ideal is probably something simple and in expensive. As the Australian Report (7) put it, what is needed is a "cheap, simple, self-help procedure."

2. Appropriate safeguards

As well as there being unanimity on the ideal of maximum freedom for the individual, there is also unanimity that there is a need for "appropriate safeguards". That phrase is used in the statement of the basic policy objective in Appendix A, and the Australian Report (7), after its reference to the need for a simple self-help procedure, immediately added the qualification "subject to appropriate safeguards."

The primary purposes which might justify safeguards are first, ensuring that the intent of the principal is carried out, and second, protecting the principal against the improper conduct of the agent.

Safeguards may take the form of formalities in the creation of instruments, limitations on what may be included in instruments and supervision of agents in the exercise of their authority.

3. Freedom of choice and safeguards

To the extent that safeguards are put in place, principals will almost inevitably be limited in acting in whatever way seems best to them. The issue then becomes one of striking a balance between total freedom to proceed as one sees fit, and the imposition of safeguards which will compromise that freedom.

There would seem to be general agreement on what the basic philosophy should be in striking that balance. In 1975, B.C. Report (1975) (21) expressed a "preference for simplicity." In 1990, the Alberta Discussion Report (35), having surveyed a number of jurisdictions, concluded that enduring power of attorney legislation "particularly in Canada, tends to favour simplicity over formality. We agree with that philosophy". Some aspects of the Canadian legislation will be considered at various places in Chapter III. For the moment, it suffices to say that the assessment in the Report is accurate.

The Alberta Report (35) stated that two conditions had to be met before measures were adopted which constrain simplicity:

> "First, the purpose underlying the safeguard must be sufficiently important to justify the encroachment on simplicity. Second, there must be a likelihood that the safeguard will achieve its purpose."

With respect to the first of these conditions, as was noted above, the primary purposes which might justify safeguards are first, ensuring that the intent of the principal is carried out, and second, protecting the principal against misconduct of the agent.

With respect to the second, two considerations come into play. As the Alberta Discussion Report stated, there must be some likelihood that the safeguard will be effective. The Saskatchewan Consultation Paper (20) expressed a similar idea:

> "Part of the attraction of enduring powers of attorney is their relative informality, which makes them accessible to the public and inexpensive to put in place. Thus formalities should not be multiplied unless they can be demonstrated to *significantly* reduce opportunities for fraud and abuse." (Emphasis added)

The English Report (#3.13) noted that if enduring powers of attorney were "hedged around with restrictions, this would not guarantee total security for the donor against determined rogues". Rogues may avoid any complexity in relation to enduring powers by resorting to some other mechanism (for example the joint bank account), or simply by exerting pressure to have transactions carried out in their favour. Nor would hedging an instrument with restrictions necessarily protect the donor from innocent misuse of authority.

It must also be borne in mind that safeguards may have negative effects. The Alberta Discussion Report (30) noted that if excessive formality is required to create an instrument, the instrument may be rarely used. People may be discouraged from using it both because of the additional formality and the expense additional formality inevitably entails. If the instrument is used, excessive formality increases the risk that it might not be properly created. And, as the English Report (#3.13) warned, restrictions may deter not the rogue, but the honest attorney:

> "Few people other than devoted relatives would take on the office of ... attorney if their powers were so limited and duties so onerous that the operation of the ...[power] became an obstacle course."

It also needs to be borne in mind that agents use their authority to deal with third parties. If the creation and use of instruments are surrounded by restrictions, it will become more difficult for third parties to be sure about the authority of an agent, and at the minimum this may cause delay in carrying out transactions. This is not in the interest of the principal.

C. INTENT

Some degree of formality may be justified in order to ensure that the intent of the principal is carried out.

Representation agreements and enduring powers of attorney are planning devices, by which an attempt is made to provide for and to some extent to control the future. If they are to be effective in that respect, there must be as much certainty as possible as to how they are created, what they say and how they operate. But it must also be borne in mind that the more complex they become the greater the risk that certainty will be compromised.

The instruments must also be able to accommodate the wishes of a wide range of people. This again may affect the mode of creation, content and mode of operation. For example, some principals may want to set out in considerable detail the authority to be exercised by an agent and the way in which that authority is to be exercised. Others may prefer to give an agent wide discretionary powers. Prima facie, the instruments available should accommodate both ways of proceeding.

D. MISCONDUCT

There is clearly a *potential* for misconduct where one person gives to another the authority to act on his or her behalf. The misuse of authority may be innocent, or it may be deliberate. How far misconduct in fact occurs is a disputed point.

1. Potential misconduct

Difficulties may arise at the time the instrument is drawn up. They may be quite innocent in origin, not attributable to any conscious wrongdoing on anybody's part. For example,

(1) the instrument may be drawn up at a time when there is already some doubt about the capacity of the principal, and so there is a risk that the instrument is invalid;

(2) even if competent, the principal may not understand the basic nature of the instrument, that is, that it is conferring on the agent the authority to make decisions which will bind the principal (and which could conceivably turn out to be disadvantageous to the principal);

(3) even if the principal understands the basic nature of document, it may contain very broad powers whose full extent the principal does not really appreciate;

(4) certain types of provisions appearing in instruments may in themselves pose excessive risks;

(5) the agent may not understand the duties imposed, either by law or by the instrument.

The difficulties may have a more sinister origin:

(1) the person who procured the creation of the power may have known the principal was not capable;

(2) the instrument may have been created through fraud or undue influence.

If it is thought necessary to deal with these potential problems which may arise at the outset, two types of safeguards may be considered:

(1) greater formality may be required in the creation of the instrument. This could include procedures for confirming the capacity of the principal, for ensuring that the principal understands the nature of the instrument and the agent the nature of an agent's duties;

(2) prohibiting the inclusion in the instrument of provisions which are seen to pose excessive risk.

Even if the instrument has been validly created, there is *potential* for it to be misused. If the principal has become incapable, he or she is in no position to control the activities of the agent. Agents may divert funds in ways that do not benefit the principal because they do not think it is improper to do so, or they may consciously divert funds when they know they ought not to do so.

If safeguards are needed to prevent this type of misuse of authority, it will require the setting up of mechanisms to supervise the agent.

2. Actual misconduct

Representation agreements are so new that, not surprisingly, there is as yet no evidence on actual misconduct. Thus, to the extent that there is evidence on misconduct, it inevitably relates only to enduring powers.

While there is general agreement that the potential for misconduct in relation to enduring powers exists and that some misconduct takes place, it much more difficult to get accurate information on the actual extent of the problem. Professor Gordon, in a paper published in 1992 (*Material Abuse and Powers of Attorney in Canada: A Preliminary Examination* (1992), 4 (1/2) Jo. of Elder Abuse & Neglect, 173, 181), reached the following conclusion:

> It is not possible to determine the scale and magnitude and, hence, the significance of reported or detected cases of abuse without first having some idea of the total number of enduring powers [of attorney]. It is not clear whether the public trustee services and community legal services are observing the tip of the proverbial iceberg (a cause for concern) or exceptions to the rule which are exposed effectively and quickly (a cause for celebration); most service providers seem to prefer the former vision and reject the latter.

My understanding is that there is no more concrete information now than there was in 1992. That is confirmed by such information on misconduct as could be obtained from the consultations undertaken, Law Reform Commission Reports and the literature.

In general, the community groups consulted thought there was sufficient misuse to require some safeguards, certainly something more than the minimal safeguards now found in the *Power of Attorney Act*. They said that some donors do not understand the wide powers they are giving to attorneys, nor that they may revoke the power. Some attorneys do not understand the obligations they are assuming in agreeing to act, and sometimes for innocent reasons, sometimes for clearly fraudulent reasons, attorneys misuse their powers. In theory, a donor may make a claim against an attorney who has, innocently or deliberately, misused funds. That, however, costs time and money, and in any event the attorney may have no, or not sufficient, assets to make restitution.

On the other hand, and again in general, the professional groups consulted strongly favoured the retention of enduring powers of attorney. They recognized that there was potential for misconduct, that no doubt some did occur, and that when it happened it could be catastrophic for the victim. They did not, however, think it is so widespread that excessive steps have to be taken to deal with it. They acknowledged that some of the community groups or the Office of the Public Guardian and Trustee might see more examples of misconduct than they did, but examples also arose in the administration of estates and in litigation. Those with experience in those areas did not think there were major problems.

Law Reform Commission Reports do not provide any conclusive evidence on the scope of misconduct by attorneys.

The Alberta Discussion Report (2, 35-36) said that safeguards might be needed to meet four objectives. (The objectives are dealt with here in a different order from that in the Report.) First, one must ensure there is evidence a power has been created; that, it was thought, could be met with a minimum of formalities. Second, consideration must be given to guarding against fraud and undue influence; but the Report noted one should not overestimate this risk, or the ability of legislation to guard against it. Third, the donor must be protected against the risk of mismanagement, either unintentional or deliberate; while donors may appreciate this risk, the Report suggested that there should be some mechanism for reviewing the attorney's conduct, and most jurisdictions have some such mechanism.

The fourth objective is to ensure donors understand the nature of what they are doing; they often do not, the Report stated, and that is a serious problem and poses the greatest danger to donors. It

purported to base it conclusions on the experience in other jurisdictions (2, 28-29). It referred to information received from the Advocacy Centre for the Elderly (Toronto), on a statement in the CBA BC Report that one of the two greatest problems was lack of knowledge and understanding by the parties, and a "concern" expressed by the then Deputy Public Trustee of British Columbia. However, the CBA BC Report did not refer to any evidence on the point. The Discussion Report also noted that these views had to be contrasted with those of the British Columbia Law Reform Commission in the B.C. Working Paper, which implicitly a least, did not see any such problem. Overall, it is suggested, this is some, but not terribly strong evidence of a problem.

The English Report (#3.22) expressed a particular concern about the elderly donor who may have sufficient capacity to grant a power, but nonetheless may not be fully able to understand what is happening. However, the Alberta Discussion Report (35-36), in considering this part of the English Report, warned against overestimating the risk, and noted that excessive formality could drive the determined rogue to use other means.

The Manitoba Report (1994) states (3-4) that there is a great *potential* for abuse. That potential is greater in the case of seniors. The Report notes that 4% of the elderly persons in Canada are subject to abuse annually. That presumably covers all abuse, not just financial abuse and does not specifically address enduring powers of attorney. The Report noted that the Elder Abuse Centre of Manitoba reported that in its first year of operation, 40% of its cases involved financial abuse, "including the misuse of powers of attorney". It is not clear if the total number of cases is 163 or 274 (see Manitoba Report (1994), 3), nor is it clear what number of cases involved powers of attorney.

The Saskatchewan Consultation Paper is, perhaps, somewhat equivocal on the issue. At one point it states that case histories gathered in preparing the paper "show that abuse of powers is a very real problem" (14). There is " accumulating evidence of abuse of enduring powers" (18). On the other hand, the Paper notes that there are "no reliable statistics on the extent of the problem" (19), and accepts that it "is likely that most attorneys conscientiously carry out their duties" (19). Nonetheless, the Paper concluded that "the number of cases of abuse is almost certainly significant" (19). In the end, the Paper's conclusion seems based primarily on two things. First, the Office of the Public Trustee reported that it received 5 or 6 complaints a month.

and it was thought that might be the "tip of the iceberg" (19). Second, lawyers, service providers, officials of the Office of the Public Trustee and other professionals interviewed "were almost unanimous" that reform was necessary. That was, of course, not the case with respect to the people and organizations consulted during the course of this review. Moreover, it will be remembered the Paper also took the view that "formalities should not be multiplied unless they can be demonstrated to significantly reduce the opportunities for fraud and abuse" (20; see above, p. 12).

One attempt made in the United States to gather evidence is reported in an article by English and Wolff, *Survey Results: Use of Durable Powers* (1996) 10 Probate & Property 33. The authors surveyed probate and estate planners, sending out 2, 224 questionnaires and getting 854 returns. These disclosed that the incidents of abuse were relatively infrequent, and that 98% of the respondents thought that that the benefits of durable powers outweighed the risk. The authors concluded that greater regulation cannot ensure perfection. If there was greater regulation, would-be donors might select even more risky ways of proceeding. The real need, the authors concluded, is a better understanding through education.

According to Lush, *Taking Liberties: enduring powers of attorney and financial abuse* (1998), 142 Sol. Jo. 808., in England financial abuse "probably" occurs in 10 to 15 percent of the cases involving registered powers and more with unregistered. These figures appear to be impressionistic rather than based on hard data, but if that be so they derive some added authority from the author being the Master of the Court of Protection.

However, the figures do not support a case for excessive formality. First, of Lush's suggested six ways of preventing abuse, four are based on what in the case of lawyers should be good professional conduct. (The fifth suggests greater use of registration and the sixth the provision of an auditing service by lawyers.) Second, and more significantly, the English Act requires more formality in the creation of enduring powers than most other Acts. Each power must have a set of explanatory notes designed to ensure that the donor and the attorney are aware of the nature of the power (s.2). In general, an attorney cannot use an enduring power unless it is registered with the court (s. 1). A wide range of relatives must be notified before registration can take place, and they have the opportunity to challenge the validity of the power (s.6, Schedule 1). If the 10 to 15

per cent figures is accurate, it would seem that excessive formality in the creation of a power is not an effective way of preventing abuse.

E. GENERAL POLICY – CONCLUSION

The above survey reveals virtual unanimity on the basic policy. People should be given the maximum freedom possible to make whatever arrangements they see fit for the handling of their financial affairs. Formalities and restrictions are justified only if they are needed to ensure that the intent of the principal is clear and to guard the principal against misconduct by the agent.

There also appears to be agreement that while most agents act honestly and conscientiously, some do not. There is no reliable information on the extent of misconduct, some believing that it is widespread, others that that is not the case.

Given the unanimity on the basic policy, a safeguard should be adopted only if it is thought there is a clear justification for it, that it will be likely to achieve the purpose for which it is adopted and that it will not have unacceptable side effects.

However, even if there were agreement on this approach, different people will inevitably come to different conclusions as to exactly what specific safeguards should or should not be adopted. It is not therefore surprising that on that question there is a distinct lack of consensus (B.C. Report (1975), 19; Alberta Discussion Report, 31-35 ("Legislative Trends"); English Report, # 3.9;).

F. BRITISH COLUMBIA

1. Opinions per se

Overall, there is a clear division of opinion on whether or not enduring powers should be abolished. It is fair to say that whatever opinion is held, it is strongly held.

The following groups favoured abolition:

(1) Alzheimer's Society of B.C.;

(2) B.C. Coalition for Community Living;

(3) B.C. Coalition for the Elimination of the Abuse of Seniors;

(4) B.C. Coalition for People with Disabilities;

(5) Community Coalition for the Implementation of Adult Guardianship Legislation;

(6) Representation Agreement Resource Centre.

The following groups favoured retention:

(1) Canadian Association for the Fifty-Plus;

(2) Canadian Bankers' Association;

(3) Canadian Bar Association, B.C. Branch;

(4) Credit Union Central;

(5) Law Society of British Columbia;

(6) Land Title Registrar, New Westminster and Vancouver Districts;

(7) Society of Notaries Public of British Columbia.

It was not possible to have a formal meeting with the Seniors' Advisory Council of B.C. However, at meeting with some of its members in their individual capacities the majority of those present favoured the retention of the enduring power of attorney.

2. Reasons

Many of the reasons for the difference of opinion are reflected in the consideration of general policy. In addition, because of the existence in the province of representation agreements, there are three other matters peculiar to British Columbia.

First, those who favour abolition of enduring powers think there is something to be said for adhering to the original intent when the *Representation Agreement Act* was passed in 1993. If abolition was valid then, it is still valid. Carrying through on the original intent would ensure that representation agreements would be used and therefore be in a better position to prove their value. Those who favour retention say that there are serious difficulties with representation

agreements. If they are to be retained, people should at least have the option of using the enduring power.

Second, at a philosophical, but in the end practical, level, it is said that the enduring power is too blunt a mechanism, vesting all decision-making power in the attorney. The representation agreement is more attuned to how decisions are made, and provides for not only joint-decision making and consultation, but also for taking into account the desires, beliefs and values of the adult. In response, it is said that, whatever be the merits of those arguments, people have in fact found the enduring power a useful device, and again at least the option of using it should be left open to those who want to use it.

Third, it is argued the possible existence of two documents, a representation agreement and an enduring power, can only lead to confusion. On the other hand, it is said the danger of any real problem is very slight, and that other jurisdictions appear to have no problems with two separate instruments.

III. ONE INSTRUMENT OR TWO?

A. INTRODUCTION

This Chapter deals with the basic question of the review – should there be one or two instruments which people can use to make arrangements for the handling of their financial affairs should they become incapable.

That question is considered by applying the criteria discussed in chapter II to representation agreements and to enduring powers of attorney. The discussion will centre on two matters, the creation of representation agreements and enduring powers, and the terms which may be included in each instrument.

B. CREATION OF INSTRUMENTS

1. Introduction

In order to create an enduring power of attorney, or enter into a representation agreement, the principal must have the capacity to enter into the transaction, and the instrument must be drawn up in accordance with the required formalities.

2. Capacity

(a) Enduring powers of attorney and section 9 agreements

Enduring powers of attorney and representation agreements made under section 9 of the *Representation Agreement Act* are subject to the same rules with respect to capacity. The common law applies to enduring powers. Capacity for section 9 agreements is expressly dealt with in section 10 of the Act. In both cases, the principal must be able to understand the nature of the authority being conferred on the agent and the consequences of conferring that authority. Whether or not in any given case the principal has the necessary capacity depends on the application of that test to the particular circumstances of the case.

(b) Section 7 agreements

Section 8 of the *Representation Agreement Act* deals with capacity in the case of section 7 agreements. Section 8(1) provides that a person is not to be deemed to be incapable because he or she may not have the capacity to enter into contracts or manage his or her personal or financial affairs, and section 8(2) lists four factors that must be taken into account in deciding whether or not a person has capacity. The section does not however state in a positive way what the test for capacity is.

That leaves the law in an uncertain state. Indeed, section 8(2) may be misleading. People may draw from it the inference that a person in fact has capacity to make a section 7 agreement even though he or she has no capacity to make a contract, or manage his or her personal or financial affairs. The intent no doubt is that a lack of capacity on those matters does not preclude a decision a person has capacity under section 7, but does not compel such a decision.

Prima facie, it would be desirable to insert a positive definition of capacity in section 8. However, it is impossible to secure agreement on what that definition should be. In part that may be understood by reference to the origin of section 7 agreements.

Section 7 agreements are not intended to operate in commercial settings, nor to be used in a typical estate planning setting. Rather, those who designed them had in mind a family situation, where a member of the family might not on the conventional test to be clearly capable or clearly incapable. The person might be able to make some types of decisions and not others, or be able to make decisions at some times and not others. This, it was thought, did not lend itself to the conventional test for capacity, which requires a definitive decision and deprives the person of all personal decision-making power. Section 7 was designed to provide a more flexible arrangement, under which a person could be assisted to make decisions, and have decisions made for him or her only as a last resort. The representatives would often be members of the family or family friends. As a matter of practice, many families probably operated in this way. The legislation gives what they do some legal status, particularly in dealing with third parties.

That is a worthy objective and the legislation should at least be given a chance to prove itself. There may be obstacles which will force some reconsideration of the issue. One is the reluctance

of lawyers (and perhaps notaries) to draw section 7 documents precisely because of concerns about capacity. However, even as the legislation now stands, section 7, as opposed to section 9 agreements, do not require the involvement of lawyers or notaries in their creation. Another possible difficulty is that third parties may be reluctant to act on the basis of a section 7 agreement. They might in some cases ask for evidence of capacity. The reluctance of third parties to accept an agreement without question may be alleviated if the general recommendations relating to third parties made in Chapter V were accepted.

3. Formalities

The procedure for the creation of an enduring power of attorney is simple, that for the creation of a representation agreement more complex. In addition to looking at them, it will also be useful to look at the position in other jurisdictions.

(a) *Power of Attorney Act*: enduring powers of attorney

Section 8 of the *Power of Attorney Act* provides that an enduring power of attorney must be:

(1) in writing;

(2) signed by the donor;

(3) witnessed by one witness. Subject to the provisions of the *Land Title Act*, anyone other than the attorney or the spouse of the attorney can be a witness.

The attorney does not need to sign the power for it to be valid.

If the power is to be used in the registration of a transaction involving land, the requirements of the *Land Title Act* must be complied with:

(1) the power or certified copy of the power must be filed with the registrar (s. 51 (1));

(2) the execution must be witnessed or proved in the manner required for instruments under Part 5 (sections 41-50) of the Act. Section 42 provides that instruments

must be witnessed by an officer who is not a party to the instrument. An officer is a solicitor, notary or a person authorized under the *Evidence Act*, R.S.B.C. 1996, c. 124, to take affidavits for use in British Columbia;

(3) if an individual attorney executes a document dealing with land and the document is to be registered, section 45 of the *Land Titles Act* provides that the signature of the officer as a witness is a certification by the officer that the attorney appeared before the officer and acknowledged that:

(a) he or she is the attorney of a subsisting power of attorney;

(b) he or she has no knowledge of the death or bankruptcy of the donor or of the revocation of the power;

(c) in the case of an enduring power, that he or she has no knowledge of the termination of his or her authority under section 8(2) of the *Power of Attorney Act*; and

(d) the signature witnessed by the officer is the signature of the person who made the above acknowledgement.

(For corporate attorneys see s. 46.)

(b) *Representation Agreement Act*: representation agreements

With two exceptions, the formalities under the *Representation Agreement Act* for the creation of the section 7 and section 9 agreements are the same. The rules that apply to both may be summarized as follows:

(1) the agreement must be in writing (s.13 (1);

(2) it must be signed by the adult (s.13(2); (and see s. 13 (4) for the affixing of a signature on behalf of an adult who is not physically capable of signing in person);

(3) the adult's signature must be witnessed by two witnesses (s. 13 (3.01)), unless the witness is a person referred to in section 9 (2) with whom the adult consulted and who prepared a consultation certificate. In that case, the signature of that person alone will suffice (s. 13 (3.02)). (As to consultation see below.) The implication is that the witness(es) must actually see the adult signing, and that it will not suffice for the adult to acknowledge a signature already made. That is confirmed by the prescribed certificate for witnesses, which requires the witnesses to certify that they "were present together" when the adult signed;

(4) the witness(es) must sign the agreement (s.13(3.01)). There is no express requirement that the witness(es) sign in the presence of the adult, or, if there are two, in the presence of each other (though it would probably be wise to follow that practice);

(5) the following persons may not act as witnesses: a representative (including an alternate representative); a representative's spouse, child, parent, employee or agent; a person under the age of 19; a person who does not understand the type of communication used by the adult (s. 13 (5));

(6) a witness must complete a certificate in the prescribed form (s. 13 (6)). If the witness is someone other than a person consulted under section 9 (2), the prescribed form requires the witness, *inter alia*, to state that he or she "has no reason to object to the making of this representation agreement." ; see B.C. Reg. 199/2001, Form 5;

(7) the representative or representatives (including alternate representatives) must also sign the instrument (s.13(2)), but their signatures need not be witnessed (s.13 (3.03)), nor need they sign in the presence of each other or the adult (s.13.(3));

(8) each representative must complete a certificate in the prescribed form(s. 5 (4));

(9) if a monitor is appointed by the agreement, the monitor must complete a certificate in the prescribed form (s. 12(5)). In general the appointment of a monitor is optional. However, if the agreement confers on the representative

authority under section 7(1)(b) to carry out "routine management" of the adult's financial affairs a monitor must be appointed, unless (s. 12 (1)):

(a) the representative is the adult's spouse, the Public Guardian and Trustee, a trust company or credit union;

(b) there are two or more representatives who must act unanimously; or

(c) the adult consults with a person referred to in section 9 (2), and that person prepares a certificate in the prescribed form;

In the case of section 9 agreements, there is one more formality which must be complied with, and a second which will have to be met if the agreement is to be used in the registration of a transaction involving land.

If the agreement authorizes the representative to do anything described in section 9(1):

(1) the adult must consult a person who is a member of the Law Society of British Columbia or a class of persons prescribed under the Act (s.9 (2)). It is intended that members of the B.C. Society of Notaries, if they meet certain conditions, will be a prescribed class;

(2) the person consulted must complete a certificate in the prescribed form. It requires the person consulted to confirm that he or she explained the provisions of the agreement to the adult, and that the adult appeared to understand the nature and effect of the authority given to the representative; B.C. Reg. 199/2001, Form 2;

(3) the person consulted need not be a witness. However, as a matter of practice it makes sense for that person to act as witness, for, as was noted above, that in itself meets the requirements for witnesses and a second witness is not then required.

If a section 9 agreement is to be effective for the purposes of the *Land Title Act*, the provisions set out above with respect to enduring powers of attorney apply, *mutatis mutandis*, to the

agreement; see the *Representation Agreement Act*, s. 9 (3.1); *Land Title Act*, as amended *Adult Guardianship Statutes Amendment Act, 2001*, S.B.C. 2001, ss. 17, 18.

(c) Other jurisdictions: enduring powers of attorney

The other Canadian common law provinces have in large measure adopted a simple approach to the formalities that must be observed in creating enduring powers of attorney. There are differences between the various statutes, and proposals for change have been made in Nova Scotia and Saskatchewan.

The general thrust of the existing law may be summarized as follows:

(1) the instrument must be in writing;

(2) it must be signed by the donor in the presence of one witness. Ontario requires two witnesses;

(3) the witness(es) must sign and must do so in the presence of the donor (this latter requirement is a matter of implication in some cases);

(4) the witness cannot be the attorney or (except in New Brunswick) the spouse of the attorney. The Ontario and Manitoba Acts contain further provisions on who can be a witness; they are discussed below;

(5) the instrument must contain a statement that it is intended to continue to be valid even if the donor should become incapable.

Alberta Act, s. 2; Manitoba Act, ss. 10, 11; New Brunswick Act, s. 58.2; Newfoundland Act, s. 3; Nova Scotia, s.3; Ontario Act, ss. 10, 7; P.E.I. Act, ss. 5, 6; Saskatchewan Act, s.3.

Beyond these common requirements, there are additional formalities which are found in some statutes, or discussed in the Nova Scotia Report and the Saskatchewan Consultation Paper. They relate to witnesses, the role of lawyers and explanatory notes.

(i) *Witnesses*

For present purposes, consideration may be given to three additional requirements that either exist or have been discussed.

Number

As was noted above, Ontario requires two witnesses. The Nova Scotia Report and the Saskatchewan Consultation Paper recommend two witnesses. They both refer to the Ontario Act. The Nova Scotia Report also justified its recommendation by analogy to the requirement for the making of a will, and on the basis it would impress on the donor and witnesses the significance of the making of an enduring power.

It would seem the jurisdictions that have, or reports that favour, two witnesses proceed on the *a priori* basis that there is some advantage in there being two witnesses. There is no evidence to support that view, and conversely there is no evidence that there being a need for only one witness has been the source of problems.

Who may be a witness

The Ontario Act (s. 10 (2)) contains additional exclusions on who can be a witness. They are: the grantor's spouse (or partner); a child of the grantor or a person "whom the grantor has demonstrated a settled intention to treat as his her child"; a person under guardianship; a person less than 18 years old. The Nova Scotia Report (18) and the Saskatchewan Consultation Paper (Recommendation 2) made recommendations to substantially the same effect.

The legislation in Manitoba takes a different approach to witnesses. It does not exclude specified persons, but instead provides that only certain people can be witnesses. They are: a person registered, or qualified to be registered, to solemnize marriages; a judge of the superior or provincial courts, a justice of the peace or magistrate; a medical practitioner; a notary; a lawyer; a member of the RCMP; a member of a municipal police force who exercises the powers of a justice of the peace. The Nova Scotia Report rejected this approach. It thought (16) that "requiring that an 'authority figure' act as a witness would not necessarily make the document

more reliable." The Manitoba legislation will also make execution considerably more cumbersome.

In some measure the same comment may be made on the exclusion of witnesses as was made on the number of witnesses. The additions to the list of those who cannot act as witnesses seems to be based on *a priori* grounds. In terms of principle, persons may be excluded as witnesses if they have enough of an interest in the creation of a document that their signing might call the voluntary creation of the document into question. Presumably it is on that basis that the attorney and the attorney's spouse are prohibited witnesses. Equally, as will be seen in Chapter IV, a case can be made for excluding as witnesses anyone who could take a benefit under the power. Even then, it must be remembered that there is no clear evidence that the limited prohibitions on who may be a witness has been as a source of difficulty.

Role of witnesses

As the Saskatchewan Consultation Paper (20) notes, the "role of the witness, as a strict matter of law, is limited to authenticating the signature on the document". In some cases more may be required of witnesses.

First, a witness may be required to certify in writing that he or she is an eligible witness. The "Witness Certification" form prescribed under the *Representation Agreement Act* requires the witness to certify that he or she is not a "prohibited" witness; B.C. Reg. 199/2001, Forms 2, 5. The Manitoba Report (7) thought that a witness would be "well-advised" to designate his or her position on the instrument, but did not think a failure to do so should invalidate the instrument. The Saskatchewan Consultation Paper (Recommendation 3), recommended for discussion a suggestion that witness acknowledge that they are eligible witnesses, but also said that failure to do so should not affect the validity of the instrument.

Second, a witness may be required to make some statement about the validity or apparent validity of the power. The "Witness Certification" form under the *Representation Agreement Act* requires the witness, if he or she is not a person with whom the adult has consulted under section 9(2), to state that or she has no reason to object to the making of the agreement; B.C. Reg. 199/2001, Forms 2, 5. Originally, the Ontario *Substitute Decisions Act*, s. 10 (3) provided that

the witness sign the power "if the witness has no reason to believe the grantor is incapable of giving a continuing power of attorney." That provision was however repealed in 1996; see now *Substitute Decisions Act*, s. 10. The Saskatchewan Consultation Paper (Recommendation 3) recommends for discussion a proposal that the witness should affirm that the donor appeared to understand the nature of the power, but again with the proviso that a failure to do so should not invalidate the power.

Requiring a witness to sign a statement that he or she is not a prohibited witness, may have some, but limited, value. Its endorsement in Manitoba and Saskatchewan is lukewarm. The requirement had been repealed in Ontario. It is even more problematic to require the witness to state that he or she has "no reason to object to the making" of the instrument. Is the witness required to make inquiries in all cases, or only if perhaps there are grounds for suspicion, or can the witness act on the basis of what he or she actually knows? Is a witness supposed to make some independent judgment about the possible invalidity of the instrument? What is the liability of the witness if the agreement should not have been made and the adult suffers a loss? In some cases at least, a witness may be well advised to legal advice before signing, and that advice would need to be take from someone other the person advising the adult.

On balance, no convincing case appears to have been made out for imposing on witnesses any greater role than that which they customarily perform, that is, authenticating the signature of the maker of the document, and there is no indication of any widespread trend to ask them to do more than that.

(ii) *Lawyers*

The Alberta Report (Recommendation 7) recommended that an enduring power of attorney be accompanied by a certificate signed by a lawyer, stating;

(a) the donor appeared before the lawyer;

(b) the donor appeared capable of granting the power;

(c) the donor signed, or acknowledged his or her signature, in the presence of the lawyer and acknowledge it was a voluntary signature;

(d) the lawyer was satisfied that the donor understood the explanatory notes which the Report recommended should appear on the power.

The Discussion Paper (45) noted that of the jurisdictions considered by it only New South Wales had adopted this approach. The recommendation was implemented in the original legislation; see *Powers of Attorney Act*, S.A. 1991, c. P-13.5, s. 2 (1) (b) (4), (3). However, these provisions were repealed in 1996; see *Personal Directives Act*, S.A. 1996, c. P-4.03, s. 40.

The Nova Scotia Report (18-20) recommended against a mandatory requirement that a lawyer had to be consulted by the donor and that the lawyer provide a certificate of independent legal advice. It acknowledged that there were benefits associated with such a process. But as a general rule the Commission thought that it was desirable so far as possible to minimize legal requirements. In its judgment, any benefits that might be derived from a certificate of independent legal advice were not sufficient to justify imposing it as a mandatory requirement.

The Saskatchewan Consultation Paper considered ways of protecting people who may be easily persuaded to sign a power against their own interest.. It did not think that a "witness statement" (see above), or a requirement that a lawyer or doctor be a witness would be of great value. "A better approach might be to require legal advice for both the grantor and the attorney before the power of attorney is signed."(See Recommendation 4)

There is little support for the mandatory involvement of lawyers (and in the British Columbia context any other prescribed person) in the creation of powers of attorney. That is in accord with what may be seem to be the general trend of the law – it is the exception rather than the rule that people be required to retain lawyers to carry out transactions. If lawyers (or notaries) must be consulted it adds to the expense of creating an instrument. That was one of common objections made during the course of the review with respect to representation agreements. Moreover, there is no evidence that the expense, and at times the inconvenience, of using lawyers or other specified persons is justified by the protection their involvement provides to the donor.

(iii) *Explanatory notes.*

The Alberta Report (17, Recommendation 9) also recommended that a power contain a set of explanatory notes, which the donor was to be encouraged to read before signing. That recommendation was implemented in 1991 (*Powers of Attorney Act*, S.A. 1991, c. p-13.5, s. 2 (4)), but was repealed in 1996 (*Personal Directives Act*, S.A. 1996, c. P-4.03, s. 4). The Saskatchewan Discussion Paper did not recommend notes on the power itself, but rather that a non-mandatory standard form be available through government agencies with instructions and appropriate information about enduring powers. The *English Act* (s.2) requires a set of explanatory notes, but, as was noted earlier (p. 17), that does not appear to be an effective way of preventing misconduct by the attorney.

4. Summary and conclusions

It is a simple matter to create an enduring power of attorney under the *Power of Attorney Act*. The legislation in the other common law provinces generally leans very much in favour of a simple scheme of execution. This is in accord with the philosophy of giving maximum freedom to the donor. Donors will not be discouraged by complexity or expense. There is less chance of a document being invalid. Third parties can act on the basis of the document with a fair degree of confidence.

Some of the other suggested requirements do not command widespread support. As a general rule, people are not required to retain lawyers in carrying out transactions, and other than it being under consideration in Saskatchewan, there is no support for making the involvement of a lawyer mandatory in the creation of a power of attorney. There is no use of explanatory notes in Canada, and their use in England may have little effect on misconduct.

With respect to witnesses, the general trend is that they do no more than carry out their normal role, authenticate the signature of the donor. There is perhaps a tendency to require two witnesses rather one, and to extend the types of "prohibited" witnesses. It must be said, however, that it seems simply to be assumed that both of these steps are going to be useful, and there is no indication there is evidence suggesting that one witness, or the limited exclusion of witnesses in the *Power of Attorney Act*, have caused difficulty. If the list of prohibited witnesses is to be

extended it should be done on more substantive grounds. The issue is discussed further in Chapter IV.

One must, of course, balance this simplicity against the risk that it will make it easier for donors to be coerced into making powers they do not wish to make, and that it will encourage attorneys, or at least make it easier for them, to misuse a power. While these are possibilities, the general pattern of legislation would suggest it is not thought that there are widespread problems, or that increasing the formalities required for execution will be a significant deterrent to misconduct.

Both types of representation agreements involve more complex formalities. In the case of a section 9 document at least four documents need to be drawn up: the agreement itself, a certificate of the representative, a consultation certificate and a witness certificate (though in the ndard form documents the two latter documents are combined). However, depending on the particular facts, more documents may be needed; additional representative certificate(s) if there are additional or alternate representatives; a monitor's certificate if there is a monitor. The appropriate consultations must take place. That will involve time and expense. Moreover, in some, if not in all cases, there will be a need for independent advice for the various parties, the adult, the representative(s), the monitor, the witnesses.

It takes time and is more costly to comply with these formalities. For the moment, it is a matter of speculation whether they will have a deterrent effect on misconduct. The complexity and expense may discourage people from using the instrument, and there are some indications that that is happening. The risk is increased that something may go wrong. (Section 13 (7) the *Representation Agreement Act* confers a discretion on a court to validate an agreement which has been improperly executed, but it is obviously better not to have to have recourse to such a jurisdiction.)

Complexity has also implications for third parties. It is relatively easy for a third party to decide if, on its face at least, a power of attorney has been validly created. It can be more time-consuming to check on the validity of a representation agreement.

Enduring powers of attorney have the advantage of being simple to create, and the risks associated with them do not outweigh the advantages of simplicity. Representation agreements

involve significantly more formality, which has its disadvantages and may not turn out to provide greater protection against misconduct. So far therefore as the matter is to be judged by their mode of creation, the enduring power of attorney is to be preferred to the representation agreement.

C. TERMS

1. Introduction

An instrument may contain terms dealing with the authority of an agent, the agent's duties and powers and what may be called the agent's rights. The authority of the agent refers to the transactions which the agent can carry out on behalf of the principal. The duties and powers of the agent control the *manner* in which those transactions are carried out. Duties are the things which the agent *must* do and powers the things which agents *may* do. Agents may also have certain rights, for example, to reimbursement for expenses properly incurred, or for payment for acting as agent.

2. Enduring powers

In the case of an enduring power, the authority of an agent – that is, the transactions in which the agent can engage – is determined solely by the terms of the instrument. Principals may draft that authority in whatever way they see fit. It may range from being broad and unlimited to being narrow and specific. The agent can, however, do no more that the instrument authorizes.

The conventional view is that attorneys are not obliged to act, but that once they do so it is clear that attorneys are subject to certain duties and have certain powers. These may be spelled out in the instrument, but it is common for the instrument either not to address such matters or to deal with them only in part. In that case, various duties and powers will be implied as matter of law. However, as a general rule, if they wish to do so, donors may exclude or vary these implied rules. For example, as a matter of law an attorney is under a duty to exercise personally the authority conferred by the instrument, and so may not delegate decision making to others. It is, however, open to a donor to confer on an attorney a power to delegate if the donor deems it appropriate to do so.

Attorneys also have what can be seen as attorney's rights. Two examples concern payment for work and reimbursement for expenses. The general rule is that an attorney is entitled to be reimbursed for properly incurred expenses. With respect to payment, it is "a question of construction in each case whether it was the intention of the parties that the agent shall work gratuitously or whether an agreement to pay remuneration was expressly made, or can be implied into the relationship." (G.H.L. Fridman, *The Law of Agency* (7th Ed., 1996)). Donors may however make whatever provision they see fit for payment and expenses.

Donors are thus free to determine what authority an attorney has, what the attorney's duties and powers are and what rights an attorney has. This is in accord with the general policy of permitting people to arrange their affairs as they see fit.

3. Representation agreements

Three sections of the *Representation Agreement Act* do, or may, limit the terms that may be included in an agreement:

(1) Duties and powers: Section 9.1 clearly prevents an adult from excluding or varying some types of duties (and perhaps) powers;

(2) Payment: Section 26 imposes some limits on the provisions that an agreement may make on the payment of a representative;

(3) Authority: Section 9 (1) (g) *may* be open to an interpretation that would exclude an adult from conferring certain types of authority on a representative.

(a) Duties and powers: Section 9.1

(i) *General interpretation*

Section 9.1 reads in part:

"9.1 Any authority given to a representative under section 7 or 9

(a).....

(b) is subject to any conditions or restrictions placed on that authority in the representation agreement, and

(c) must be exercised in accordance with this Act."

The section clearly intends to make some of the provisions of the Act mandatory. Its exact effect is not, however, totally clear. Two points of uncertainty are relevant here.

First, there may be seen to be some contradiction between paragraphs (b) and (c). Paragraph (b) says the authority is subject to the agreement, paragraph (c) that the Act prevails. This apparent contradiction may be resolved on the following interpretation, an interpretation which, it is suggested, is quite reasonable on the language of the section. "Authority" is the "authority .... given under sections 7 and 9", that is the things which a representative may be empowered to do, for example, open and operate bank accounts, buy and sell property, lend or borrow money, make gifts. The agreement may impose restrictions or conditions on those types of authority, for example, limits on the number and amounts of gifts that may be made. The duties imposed by the Act (and perhaps also the powers conferred by it) that apply when that authority is to be "exercised" is another matter. In that respect, the agreement may not change those duties (or powers). In what follows that interpretation will be assumed to be correct.

Second, it is not clear exactly what falls within paragraph (c). It states how the authority of a representative "must" be exercised. That may refer only to duties. On that basis, it would cover section 16, which deals with the duties of representatives, and by implication with section 23, which provides that a representative who complies with section 16 is not liable for any financial loss. On a "broader interpretation" it may extend to powers of the representative, and so would catch section 17 (which confers a power to retain persons to assist the representative).

It should be noted, however, that section 9.1 does not apply to monitors. It may be therefore that agreements may vary monitors' duties and powers (section 20), and liability (section 25).

On either interpretation, it should be noted that some of the sections in Part 3 provide in part for their provisions being overridden by the agreement; see, for example, section 16 (2.1); section 18 (3).

It would be desirable to have these uncertainties cleared up. For the moment, however, we can proceed on the basis that the clear policy and intent of the Act is that at least the duties of the representative as set out in section 16 are mandatory, and cannot be varied by the agreement.

(ii) *Statutory duties and powers that may not be changed*

Given that at least the duties imposed by section 16 are mandatory, if enduring powers of attorney were abolished, people would be deprived of the opportunity of varying or excluding the duties and powers set out in the section. Some examples may be given of what could not be done.

(1) Standard of care

Section 16 (1) (c) provides that a representative must exercise the "care, diligence and skill of a reasonably prudent person". Many principals will no doubt find the standard acceptable, indeed desirable. However, it is a fairly high standard and some donors of powers of attorney might want to lower it. For example, if a power is being conferred on a family member a donor may not want to impose such an onerous obligation. That option is not open in the case of an agreement because of section 9(1). (There may be an issue as to how far the standard may be lowered. That is not dealt with here.)

(2) Delegation

The general common law rule is that a principal may not delegate decision-making power to third parties. That does not prevent agents from taking advice, provided that, in the end, decisions are made by the agent. And once a decision has been made, agents may retain someone to assist in the mechanical implementation of the decision. In taking advice or in retaining someone to assist in the implementation of decisions, agents must still comply with the appropriate duty of care in selecting, setting the terms of the retainer and monitoring the activities of those whom they retain.

An enduring power may exclude the common law. An instrument may, and often does, confer on an attorney broad powers of delegation. Similarly, though in fact it may be rarely done, a power

could prohibit or limit the attorney in taking advice or retaining someone to assist in the implementation of decisions.

Section 16 (6) adopts the common law non-delegation rule. It permits only one exception. Section 16 (6.1) provides that a representative may delegate to "a qualified investment manager" all or part of the agent's authority in relation to investment matters. Section 17 authorizes a representative to "retain" a "qualified person to assist the representative". Section 17 would be seem to be a statutory adoption of the common law rule that an agent may retain someone to assist in the implementation of decisions the agent has taken; and it may, though on this it is not totally clear, authorize the representative to take advice. It clearly is not intended to authorize delegation as such, for if it were so interpreted it would flatly contradict section 16(6).

In relation to financial matters the *Representation Agreement Act* is too restrictive. The common law rule against delegation is a valid starting point, but there is no reason why a principal should not be able to authorize whatever delegation he or she sees fit.

(3) Consultation

The "consultation" requirements of the Act are set out in section 16 (2) – (4). They give rise to a number of questions on their interpretation and application. However, while important, those questions need not be explored in the present context. The requirements themselves may, in very general terms, be summarized as follows:

(1) a representative must, to the extent reasonable, consult with the adult when making, or helping the adult to make a decision, to determine what the adult's current wishes are, and comply with those wishes if it reasonable to do so (s. 16 (2));

(2) if the adult's current wishes cannot be determined or it is not reasonable to comply with them, the representative must comply with any "instructions or wishes" the adult expressed while capable (s. 16(3));

(3) if the adult's instructions or wishes are not known, the representative must act on the basis of the adult's "known beliefs and values", and if they are not known in the adult's "best interests" (s. 16 (4)).

Section 16 (2.1), added in 2001 (*Adult Guardian Statutes Amendment Act, 2001*, s. 36 (c)), provides some opportunity for contracting out of these provisions. The obligation to consult may be excluded if the representative is acting under an authority given under section 9, and the agreement provides the adult need only comply with instructions or wishes expressed by the adult while capable. Two comments may be made on section 16 (2.1). First, there can be no contracting out if the authority is conferred under section 7. Thus, with respect to financial affairs, the consultation requirements must always be complied with in the case of "routine management." (Does that obligation still apply if the representative has delegated the power of investment?) Second, with respect to section 9 matters, the agreement, it would seem, need not impose an obligation to consult; it suffices if it simply requires the representative to act on instructions or wishes of the adult expressed while capable.

In the case of an enduring power of attorney, a capable donor may give specific directions to a donor. There is however, as a matter of law, no obligation to consult, even with a capable donor, nor to act on the basis of any known values or beliefs. Donors may include provisions in the instrument dealing with these matters if they so wish.

These differences may reflect a difference in basic philosophy. Representation agreements are based on the view that decisions should so far as possible be those of the adult, made perhaps with assistance. If that is not possible, there should be as far as possible consultation. And if consultation is not possible, the values and beliefs of the adult should inform the decision. That approach, while not incompatible with dealing with financial affairs, is perhaps better attuned to dealing with personal affairs. On the other hand, the powers of attorney starts with the assumption that the donor is turning over decision making power to the attorney.

Whatever the philosophical differences, the addition of section 16 (2.1) in 2001 in practice narrows the gap between the two instruments. In the case of an enduring power there is no obligation to consult, unless the instrument provides for it. In the case of an agreement there is an obligation to consult, unless the agreement excludes it. But differences are not totally bridged.

There are limits on how far the obligation to consult may be excluded. The obligation to consider the last known values and desires cannot be excluded. If the obligation to consult is not excluded the requirements of the Act may be difficult to apply. The enduring power of attorney leaves donors to fashion as they see fit an obligation to consult or take into account particular views. These matters may not be major in themselves, but they add some weight to the considerations favouring the retention of enduring powers.

(b) Payment: Section 26

Section 26 of the Act provides that a representative is not entitled to be paid for work done as a representative, unless the agreement expressly authorizes it and sets the amount and rate of remuneration. If it is intended that an attorney should be paid, the prudent thing to do is to provide for that in the instrument, and that may be done in any way the donor sees fit.

It is not however sufficient under section 26 that there be a clause in the agreement. Under section 26 (1) (c), a clause providing for payment is effective only if one of the following conditions is met:

(1) a court authorizes that payment be made;

(2) the adult consulted with a person referred to in section 9 (2), and completed a certificate in the prescribed form.

There are some difficulties with the interpretation of section 26 (1) (c). First, it is not clear if a court approves a clause *per se*, or whether it approves each payment. Second, a consultation and certificate will be required if a payment clause is to be included in a section 7 agreement. Normally, consultation is not required in the case of this type of agreement. Section 26 (1) (c) seems to require a "full" consultation, not simply a consultation confined to the question of payment. Third, where a required consultation does not take place the normal result is that the agreement is invalid. It may be that the intent of section 26 is that only the payment clause is invalid.

The two conditions set out in section 26 do not of course apply in the case of enduring powers. To the extent that payment clauses are included in powers, there is no indication they have

caused problems. People should be free to select the payment provisions they wish. Enduring powers afford them that opportunity.

(c) Authority: section 9 (1) (g)

Section 9 (1) (g) reads as follows:

> " In a representation agreement, an adult may also authorize his or her representative to do any or all of the following: .....
>
> > (g) do, on the adult's behalf, any thing that can be done by an attorney acting under a power of attorney, *and that is not mentioned in paragraphs (a) to (f) or in section 7(1)*." (Emphasis added)

"Also" in the first line of section must mean in addition to what may be authorized under section 7.

Under the first part of paragraph (g) an agreement may, with respect to financial affairs, confer on the representative all the authority which may be conferred on an attorney by a power of attorney. That prima facie puts the two instruments on the same footing. However, on what may be referred to as a restrictive interpretation, the second part of the paragraph (italicized above) may be read as precluding a section 9 agreement from dealing with anything mentioned in section 7(1) or in paragraphs (a) to (f) of section 9 (1) itself, other than in the manner provided for in those sections. The restrictive interpretation may be illustrated by considering section 7 (1) (b) and section 9 (1) (f).

Under section 7 (1) (b), an agreement may authorize a representative to make, or to help the adult make, decisions on "routine management of the adult's financial affairs". That includes "the making of investments" (s. 7 (1) (b) (iv)). As investing is mentioned in section 7 (1), it would seem that paragraph (g) prevents an agreement from dealing with that topic. If that be so, it is a matter of some import because of the regulations. They provide that "routine management of the adult's affairs" includes "making, in the manner provided in the *Trustee Act*, any investments that a trustee is authorized to make under that Act"; B.C. Reg. 199/2001, s. 2 (1) (s). The range of investment available under the *Trustee Act* is very narrow, and it is not uncommon for documents to confer wider powers of investment. If a section 9 agreement cannot deal with

investments other than in the manner provided in the regulations, that (desirable) option is not open to those creating representation agreements, but is open under an enduring power.

Under paragraph (f) of section 9 (1), a representative may be authorized to:

> "make arrangements for the temporary care, education and financial support of
>
> (i) the adult's minor children, and
>
> (ii) any other persons who are cared for or supported by the adult;"

The relation of this paragraph to paragraph (g) is doubly problematic. Does it "mention" "*temporary* care, education and financial support", in which it may be said that leaves it open for a section 9 agreement to deal with permanent care, education and financial support. On the other hand, if it "mentions" "care, education and financial support", it may follow that an agreement could not deal with permanent care, education and financial support.

On might try to avoid this interpretation by relying on section 9.1 (b). It provides that any authority given to a representative under sections 7 or 9 is "subject to any conditions and restrictions placed on that authority in the representation agreement." But it is not clear what is meant by "conditions and restrictions" in paragraph (b). One can again use as an example the authority to carry on routine management of the adult's affairs, and that being defined as including, *inter alia*, investing in accordance with the *Trustee Act*. Paragraph (b) permits "conditions and restrictions" to be imposed on that authority. It would however be difficult to construe that as authorizing a totally different range of investment powers

It was perhaps not intended that paragraph (g) be given this restrictive interpretation, and the fact that it might be so read is an accident of drafting. If that be the case, and the Act were to continue to deal with financial affairs, it should be amended to make it clear that a section 9 agreement may confer unlimited financial authority on a representative.

4. Conclusions

Section 9.1 of the *Representation Agreement Act* prohibits an agreement from varying the provisions in sections 16. That affects such things as the standard of care, delegation and the obligation to consult. Section 26 limits what the agreement may do with respect to payment of the representative. Section 9 (1) (g) may limit the extent to which an agreement may deal with investments or make provision for minor children or persons supported or cared for by the adult. A power of attorney may deal with these matters as the donor sees fit. That is in accord with the basic policy of people being free to draft as they see fit, and there is no evidence that this has been the source of problems. Enduring powers should be retained to afford people the option of creating an instrument as they wish to create it.

D. OVERALL SUMMARY AND GENERAL RECOMMENDATION

1. Summary and recommendation

The enduring power of attorney is a much simpler instrument to create than the representation agreement. There are no convincing grounds to believe that the added complexity of the representation agreement affords significantly greater protection to those who wish to make arrangements for the managing of their financial affairs in the event of incapacity. It does, however, increase the risk that instruments may not be validly created and adds to the expense of creating them, an expense which it seems some people cannot or do not want to incur. The complexity of the document may also have the effect of making it more difficult for a representative to deal with third parties.

In some respects it is clear that the *Representation Agreement Act* curtails people with respect to the type of provisions that they may include in an agreement, and in other cases it may have that effect. No such constraints exist in the case of enduring powers. There is no reason to believe that the greater freedom open to persons drawing up enduring powers has resulted in any problems.

The law in other Canadian common law jurisdictions supports the view that the enduring power is the better instrument for use by people wishing to make arrangements for the management of

their financial affairs should they become incapable. While there is no absolute uniformity, the clear trend in other jurisdictions is to make the creation of instruments as simple as possible, and not to impose restrictions on the type of provision a donor may adopt.

The terms of reference for the review put the question: should there be one document or two available to make arrangements for managing one's affairs in the case of incapability? It is clear that the advantages of the enduring power of attorney are such that it should be retained. In theory it could exist side by side with the representation agreement. People would then have the choice of which instrument they wished to use. There might well be some, though not necessarily insuperable, problems from the existence of two documents fulfilling the same function.

Nonetheless, if one instrument is in fact thought to be preferable to the other, it is better as a matter of principle to have only one document. That has the added advantage that it will avoid any difficulties that could arise from having two instruments of somewhat different natures performing similar functions.

It is recommended therefore that the better thing to do is to retain enduring powers of attorney as the sole instrument for making arrangements for dealing with financial affairs. Representation agreements should be retained for dealing with personal matters. The one qualification on that is that the provisions on section 7 agreements as they now are found in the *Representation Agreement Act* should not be altered.

2. Implementation

The implementation of this recommendation raises some basic issues as to how to proceed. Three matters need to be dealt with here, for they are they part of the background to the detailed suggestions in Chapters IV and V.

First, setting aside for the moment section 7 agreements, the proposal presumes the need to create two documents, one for personal and the other for financial matters. That is in fact the pattern in other Canadian jurisdictions, and in many cases people may in fact want two separate documents. Some may prefer a single instrument, and that opportunity should not be foreclosed,

unless there is good reason for it. If a single instrument could be used, ideally the same rules should apply in the case of personal matters as apply to financial matters. It will be suggested later that there is no reason why there should not be simpler rules for the creation of an instrument dealing with personal affairs, and some other suggestions will be made for the assimilation of others aspect of the instruments. However, even if it fell within the terms of reference for this review, there has not been the time to consider fully whether it is desirable to have a total assimilation of all the law on personal and financial instruments. Similar if not identical rules for creation would make it easier for a single instrument to be used. However, without a single set of rules on all other matters it may not be very practical.

Second, what terminology is to be used to describe the instruments? It may be said that "representation agreement" (and the associated word "representative") mean much more to the non-lawyer. It would be better therefore to use this language for both instruments, and it would be particularly appropriate in the case of a single instrument. There is however some advantage in having language which will differentiate between instruments that perform different roles. This is the pattern in other jurisdictions. For financial instruments they use the term "enduring power of attorney". There is some advantage in having uniformity across the country. This, amongst other things, helps the recognition in one jurisdiction of a document prepared in another.

Third, should there be one Act or two? If there were to be a uniform set of rules and a uniform terminology for personal and financial instruments, it would make some sense to have a single Act. Absent that uniformity, there is no particular advantage in a single Act, and it is simpler to proceed by amendments to the two existing Acts. The pattern in other Canadian jurisdictions is to have two Acts. The only exception is Ontario, which has a single Act, but that Act provides for two separate instruments. In substance therefore it follows the pattern of the other Canadian jurisdictions.

RECOMMENDATION 1

(1) Except for agreements made under section 7 of the *Representation Agreement Act*, the enduring power of attorney should be the sole instrument available for

making advance arrangement for the management of a person's financial affairs in anticipation of possible incapacity.

(2) The *Representation Agreement Act* should be amended to remove from it all references to financial affairs, other than those necessary to accommodate the continued existence of section 7.

(3) If those recommendations are accepted, consideration should be given to the implementation of Recommendations 2-25 in Chapter IV and Recommendations 26-39 in Chapter V.

IV. ENDURING POWERS OF ATTORNEY

A. INTRODUCTION

On the assumption that recommendation I is implemented, this chapter makes recommendations on amendments to the *Power of Attorney Act*. (All the Recommendations should therefore be taken as recommendations to amend that Act, unless the contrary is indicated).

The legislation that was first passed permitting the creation of enduring powers of attorney did two things. Of necessity, it provided that a power of attorney could be created which continued to be valid after the donor became incapacitated. It then set out some simple rules for creating enduring powers.

It did not however take account of the fact that there are differences between the situation where an attorney is acting on behalf of a donor who still has capacity and the situation where the donor lacks capacity. More recent Reports have recommended, and many jurisdictions have adopted, additional provisions relating to enduring powers. The suggestions made here are based on some of those Reports and legislation. Four comments may be made about them.

First, the provisions are rarely prescriptive, that is they do not require that certain things be done, or that things be done in a certain way. They often provide a default position on which people can rely if an instrument is silent, but generally subject to the proviso that a donor may make different provisions in the power if the donor wishes do so.

Second, if the recommendations were adopted, that would sometimes have the effect of re-stating or clarifying the common law. There is a value in that. The enduring power did not of course exist at common law; there may be some benefit to confirming the application of some common law rules to it. And even if that does not perhaps need to be done for lawyers, there is a benefit to the non-lawyer in having a place where some basic rules are stated.

Third, on occasion it is recommended that no action be taken on matter that is discussed. In such cases it was thought useful to deal with the issue, usually because of the adoption of provisions on it in other jurisdictions.

Fourth, some of the recommendations could apply to all powers. They are however considered only in relation to enduring powers.

B. DEFINITION

It may be useful to provide a definition of an enduring power. It may be defined as a power which is executed in accordance with the requirements of the Act for the execution of enduring powers, and which provides that the authority of the attorney continues despite the incapacity of the donor. The Act could then provide, as section 8 of the *Power of Attorney Act* now does, that such a power will not be terminated solely by the subsequent incapacity of the donor.

This would not represent any change of substance. It retains one particular feature of the present law, the power itself must provide that it will continue despite any incapacity of the donor. This is typical of enduring power of attorney legislation, and has the incidental advantage of making the instrument more acceptable in some other jurisdictions; see, for example, Manitoba Act, s. 25.

In this respect, there is a difference between enduring powers and representation agreements. The *Representation Agreement Act* does not require that any statement as to its "continuing" nature appear in the agreement itself. Section 9.1 (a) provides that the authority given in an agreement created in accordance with the Act is not terminated solely because the maker subsequently may become incapable of making an agreement. This means that a third party dealing with a representative will get no indication from the agreement of its continuing nature. It seems preferable that a statement to that effect appear on the face of the instrument.

RECOMMENDATION 2

The Act be amended by repealing section 8 and by:

(1) inserting a definition of an enduring power of attorney. This would provide that an enduring power is one that is created in accordance with the provisions of the Act and that provides that the authority of the attorney is to continue despite any incapacity of the donor; and

(2) by providing that a power that falls within the definition is not terminated solely by the subsequent incapacity of the donor.

C. CREATION OF ENDURING POWERS

1. Donors

(a) Age

At common law the position is not clear, but it would appear a person under the age of majority may grant a power of attorney. As the attorney acts as the donor, presumably any actions of the attorney while the donor is a minor would be binding on the minor only to the extent the acts of the minor himself or herself would be binding. Acts of the attorney when the minor reaches the age of majority will be presumably be binding in the same way as they would on any adult principal.

So far as it is governed by statute, Canadian jurisdictions differ in their treatment of the issue. The *Representation Agreement Act* (applying as it now does to both personal and financial matters) provides that only adults may make a representation agreement, but Canadian legislation dealing with health care directives varies on whether the maker of an instrument must be of age. The Alberta Discussion Report (59) recommended against prescribing any minimum age for donors of enduring powers, but the Alberta Act (s.2 (1) (a)) requires that the donor be an adult. The Newfoundland Act (s. 3 (2)) is to the same effect. The Manitoba and Prince Edward Island Acts, the Nova Scotia Report and the Saskatchewan Discussion Paper do not refer to any age requirement. Section 4 of the Ontario Act provides that Part I of the Act (which deals with property) applies to decisions made on behalf of persons who are at least 18 years old. This may be read as prohibiting a power from being used while a person is under the age of 18, but not prohibiting a person under 18 from creating a power. That view is supported by section 5, which prohibits a person under 18 from making a decision for another person. If the Act had sought to prohibit a person under 18 from granting a power it could have done so in the same express manner.

From this brief survey, it can be concluded that the age at which an enduring power may be made has not been seen as a major issue, if indeed an issue at all. There is no indication that what uncertainty there may be in the common law has been a source of problems. The very practical reason for that is that it is generally only when they are well past the age of majority that people consider drawing up enduring powers. For the purpose of this review the law can be left as it is.

RECOMMENDATION 3

> No provision be included in the Act on the required age for making enduring powers of attorney.

(b) Capacity

Section 3 of the *Representation Agreement Act* presumes capacity until the contrary is demonstrated. The common law also presumably assumes capacity, but if the issue is raised, it may be that, by analogy to the law of wills, the burden of proof of capacity rests upon those who wish to uphold the validity of the power. It would in any event be preferable that the rule for powers and representation agreements be the same. Thus, a provision comparable to section 3 should be inserted in the *Power of Attorney Act*.

The common law test for capacity for enduring powers of attorney and the statutory test for section 9 representation agreements are essentially the same. The test for those representation agreements is set out in section 10 of the *Representation Agreement Act*:

> "An adult may authorize a representative to do any or all of the things referred to in section 9 unless the adult is incapable of understanding the nature of the authority and the effect of giving it to the representative."

(See also the Manitoba Act, s. 10 (3).)

Ontario has a much more complex statement of what constitutes capacity; see the Ontario Act, s. 8 (1). In a case where capacity is clear, the added complexity adds little. If capacity is in doubt, it directs attention to specific matters which would probably be considered in the application of the common law test. However, the detail of the legislation opens up the way for "a nit-picking" approach which the general statement avoids.

There would be some advantage in having the same test for capacity for enduring powers and section 9 representation agreements. Section 10 of the *Representation Agreement Act* appears to state the common law. Its simplicity is to be preferred to the more complex approach in the Ontario Act. A section similar to section 10 should be added to the *Power of Attorney Act*.

RECOMMENDATION 4

A section be added to the Act providing:

(1) that a person has capacity to grant an enduring power of attorney if he or she understands the nature of the authority created by the power and the consequences of giving it to the attorney;

(2) that a person shall be presumed to have the capacity to grant a enduring power of attorney unless the contrary is established.

2. Attorneys

Three matters concerning attorneys might be considered for inclusion in the legislation: who may be an attorney, the number of attorneys, and joint and successive attorneys.

(a) Who may be an attorney?

There is considerable variation in the legislation and the Reports on what provision, if any, is or should be made for the qualifications for being an attorney, or for the grounds on which a person may be prohibited from acting as an attorney. The issue may be looked at generally, and then specifically in relation to care providers.

(i) *Generally*

Support may be found in the legislation and Reports for the following prohibitions on acting as an attorney:

(1) Minors It would seem that at common law a minor could be appointed as an attorney. Most jurisdictions now provide that an attorney must be of the age of majority. The

Alberta (s. 2 (2)), Manitoba (s. 16) and Newfoundland (s. 3(2)) Acts require that an attorney be of the age of majority at the time the power is created. The Nova Scotia Report (12) and the Saskatchewan Consultation Paper (Recommendation 14) make recommendation to this effect. On the other hand the Ontario Act (s. 5) requires that a person be of the age of majority in order to exercise a power, but not it would seem to be appointed in the first place;

(2) Capacity The Manitoba Act (s. 16) requires, and the Saskatchewan Consultation Paper recommends (Recommendation 14) , that an attorney must have full capacity;

(3) Bankruptcy The Manitoba Act (s.16) prohibits an undischarged bankrupt from being appointed, and the Saskatchewan Consultation Paper makes a recommendation (Recommendation 14) to that effect.

(4) Criminal offences The Saskatchewan Discussion Paper recommends (Recommendation 16) that a person who has been convicted of a fraud or fraud-related offence, and who has not been pardoned, may not be appointed.

Presumably the reason for these various prohibitions is to prevent appointments that are thought to be inappropriate. Whatever the merits of the arguments in any particular case, the practical question that arises is what are the consequences of a prohibited appointment. If an enduring power were held to be void and no remedial steps were taken before the donor became incapacitated, there would be no option but to proceed under the *Patients Property Act*. Third parties who had dealt with the attorney would (unless the law is changed) suffer the consequence of dealing with an agent who had no actual authority.

There are, it is suggested, two other possible approaches. First, if there are to be "prohibited" appointees, it could be provided that the appointment, but not the power itself, would be void. Where the donor is incapable, a discretion could be conferred on the courts to appoint a new attorney, or to direct that proceedings be commenced under the *Patients Property Act*. It would also be desirable to protect both attorneys and third parties who in good faith acted on the assumption that the appointment was valid.

Second, no restrictions might be placed on who may be named as an attorney. However, where the donor is incapable, the legislation should confer on the court the power to remove a person who, for whatever reason, either initially or in the events that happen, is not an appropriate person to act or to continue to act. (Although its views were not accepted in full, this was the recommendation of the Alberta Discussion Report (60-62)). The court could then be given the power to appoint a new attorney, or direct that there be proceedings under the *Patients Property Act*.

Recommendations are made below on giving the courts the power to appoint new attorneys, and on the general protection of third parties. If those recommendations are adopted, it may in the end not matter too much which way one deals with the issue of "prohibited" attorneys. However, the simplest way to proceed is not to include in the Act any prohibitions, leaving the common law in place.

RECOMMENDATION 5

> No provision be included in the Act placing restrictions on who may be appointed as an attorney under an enduring power of attorney.

(ii) *Care providers*

The *Community Care Facility Act*, R.S.B.C. 1996, c. 60, s. 17 (2) (f), prohibits a licensee or an employee of a community care facility from being appointed as attorney for a resident. The power and any disposition under it are void, unless the attorney is the spouse, parent or child of the resident, or the Public Guardian and Trustee consents to the appointment or the disposition.

The Saskatchewan Discussion Paper recommends (Recommendation 17) that a person who receives remuneration for providing personal or health care should not be eligible to act as an attorney. The Ontario Act (ss.24 (1), 57 (1)) prohibits the court from appointing as a guardian of property or of the person some one who provides any one of a variety of services for remuneration. The prohibition does not appear to extend to an appointment by an individual.

On the other hand, a number of Reports have recommended against imposing any prohibition against a donor appointing as attorney some one providing "care" services for remuneration: see

Alberta Discussion Report (60), B.C. Report (1975) (29); Newfoundland Report (59-60); Tasmania Report (16); English Working Paper (38-42).

If one were looking at the matter *de novo*, it would be worthwhile considering in more detail the prohibition in Section 17 (2) (f). However, a case can be made for the prohibition, it has been in place since 1982 (see *Miscellaneous Statutes Amendment Act*, 1982, S.B.C. 1982, c. 43, s.5), it presumably it reasonably well known and has apparently not been the cause of difficulty.

If Section 17 (2) (f) is retained, it needs to be considered in light of paragraph (h) of the same sub-section. That paragraph prohibits the appointment of licensees or employees of community care facilities as representatives. There are two differences between the two paragraphs.

First, the prohibition in paragraph (h) extends to appointments of representatives by former residents. Presumably the reason for the prohibition is that a licensee or employee may acquire an excessive influence over a resident. That influence could, at least for some time, continue to operate over former residents. A case may therefore be made for extending the prohibition to the appointment of an attorney by a former resident.

Second, under paragraph (f) the Public Guardian and Trustee may validate a power or disposition that otherwise would be invalid. There is no such provision in paragraph (h). It is rather problematic to give to an official such as the Public Guardian and Trustee the authority to, in effect, dispense with a legislative requirement. Such a power would be better conferred on the courts. That would be in line with the recommendation made later that the court should have the power to appointment and remove attorneys.

RECOMMENDATION 6

Section 17 (2) (f) of the *Community Care Facilities Act*, R.S.B.C. 1996, c. 60, be retained, but that it be amended so that:

(1) The prohibition on appointments is extended to appointments by former residents;

(2) The power to declare a power or a disposition valid be vested in the courts and not the Public Guardian and Trustee.

(b) The number of attorneys

Some Reports have considered the possibility of requiring at least two attorneys in the case of enduring powers. This might give added protection to the donor; one attorney would be a safeguard against the possible misconduct, innocent or deliberate, of the other. This thinking may lie behind the provisions on monitors in the *Representation Agreement Act*. There is some debate about what it was monitors were intended to do, but section 20 (1) of the Act clearly imposes a positive duty on a monitor to make reasonable efforts to determine that a representative is carrying out his or her duties under section 16 of the Act.

However, because of amendments to the Act, the appointment of a monitor is in large measure optional (see s. 12). The Law Reform Commissions that have considered the possibility of requiring that at least two attorneys be appointed in the case of an enduring power have unanimously rejected the idea. The following excerpt from the Alberta Discussion Report (62) provides a neat summary of the position up to 1990:

> "In its Working Paper, the English Law Commission made a tentative recommendation that an ...[enduring power of attorney] should have a minimum of two attorneys, who would act jointly. It was felt that this would reduce the risk of mismanagement and exploitation, because each attorney would provide a check on the conduct of the other.
>
> The Law Commission changed its position on this issue in its final report, and concluded that the legislation should not require there be two attorneys. A requirement of two joint attorneys was also considered and rejected by the law reform commissions in British Columbia, Newfoundland, Tasmania, and the Republic of Ireland.
>
> In our view the arguments against requiring a minimum of two attorneys are compelling. Such a requirement interferes with the autonomy of the donor; if the donor is content to entrust his or her affairs to one attorney, why should the legislation dictate otherwise? It also introduces additional complexity and inconvenience, and (as with any scheme requiring joint action) creates a potential for disagreement, stalemate and inaction. Moreover, its underlying premise – that two heads are better than one – is at best questionable." (Footnotes omitted)

Since the Alberta Discussion Report, the Manitoba Report (1994) (12-15), the Nova Scotia Report (12-13) and the Saskatchewan Consultation Paper (Recommendations 18, 19) have

considered some of the issues that arise when a donor decides to appoint two or more attorneys. However, they did not even discuss the possibility of making "joint" appointments mandatory.

RECOMMENDATION 7

> No provision be made in the Act requiring that there be at least two attorneys in the case of an enduring power of attorney.

(3) Joint and successive attorneys

At common law, a donor could appoint two or more attorneys, to act jointly, jointly and severally, or successively, all as the instrument provided. The *Power of Attorney Act* contemplates joint and several, but not successive appointments; section 8 (2), Schedule, Form 2. There would however seem to be no reason to doubt that a donor could provide for successive appointments. The *Representation Agreement Act*, sections 5 and 6, provides for joint, joint and several, and successive appointments.

Assuming that at common law or by statute, or both, joint, joint and several, and successive appointments may be made, the legislation and Reports in some jurisdictions deal with three matters, either changing or clarifying the common law.

First, if two or more attorneys are appointed, the question may arise as to whether the appointments are joint or successive. The Manitoba Act (s. 17 (2)) provides that when there is more than one attorney, and the instrument is silent on the matter, the attorneys shall act successively, in the order in which they are named. Other legislation and reports that deal with the matter provide that it shall be assumed they act jointly; Ontario Act, s. 7 (4); Nova Scotia Report (13), Saskatchewan Consultation Paper (Recommendation 18). In the end the issue is one of the interpretation of the instrument. If legislation is needed, it would seem better to assume that the appointment is joint and not successive. If a donor intended that the attorneys were to act successively, one would expect to find in the instrument some indication of when one was to succeed the other. Absent such an indication, it can be assumed the donor intended the attorneys to act jointly.

Second, at common law joint attorneys must act unanimously, subject to a contrary provision in the power. All jurisdictions that have considered the matter retain the common law rule, except for Manitoba. Section 18 (1) (a) of the Manitoba Act provides that the attorneys may act by majority vote, subject to a contrary intention in the instrument. The section is based on the Manitoba Report (1994) (15), which said that while requiring unanimity may prevent fraud and negligence, it could harm the donor by preventing decisive action. However, the common law requirement of unanimity does not appear to have caused difficulty, nor does it cause difficulty in other areas of the law, for example the law of trusts. There is no need to change the law, and therefore no need for legislation.

Third, at common law if there are two or more joint attorneys and one dies or resigns, the power can no longer be exercised. However, as the Saskatchewan Paper notes, it does seem reasonable to apply a "survivorship" rule, but leaving donors the option to exclude it if they so wish.

If the "survivorship" principle is accepted, there is an issue of drafting. Some legislation lists the circumstances in which a person may cease to be an attorney, and in which any remaining attorney may continue to act. For example, section 7 (5) of the Ontario Act provides that if one of two or more joint attorneys dies, becomes incapable of managing property or resigns, the remaining attorneys, subject to any provision to the contrary in the instrument, may continue to act. The Saskatchewan Consultation Paper (Recommendation 22) adopts that provision. Section 18 (2) of the Manitoba Act adds as "triggering" events an attorney not being willing or available to act. If a later recommendation that a court be empowered to remove an attorney be adopted, removal by the court could be included in the list.

It might however be useful to have some general language to cover all eventualities, for example, "on a trustee for any reason ceasing to act". If it was thought desirable to retain a list of circumstances, then a phrase along those lines could be added to catch any event that would not fall within the specific events listed.

RECOMMENDATION 8

(1) The Act be amended to provide that where under an enduring power of attorney there are two or more joint attorneys, and one dies, resigns, becomes incompetent

to act, is unwilling to act, or is unavailable to act, is removed by the court or otherwise ceases to act, the remaining attorney or attorneys, subject to any contrary intention in the instrument, may continue to act.

(2) There is no need for amendments dealing with;

(a) a presumption as to appointments being joint or successive. If there was to be legislation it should provide that appointments are presumed to be joint;

(b) the requirement of unanimity on the part of joint attorneys. If there was to be legislation, it should affirm the common law unanimity rule.

3. Execution

(a) General requirements

In chapter III it was concluded that, in general terms, the simple process of execution for enduring powers was preferable to that for representation agreements. The current requirements for execution should be retained. Enduring powers should therefore be in writing, signed by the donor and witnessed by one witness. There should be no obligation to consult a lawyer or any other prescribed person, and there should be no need to prepare certificates. It may also be useful to provide that the execution requirements apply to variation as well as creation of powers.

On that basis, three matters may need to addressed in any new legislation; the signing by the principal, witnesses and signing by the attorney.

(b) Signature by the donor

There is of course no dispute that the donor should sign the instrument, and that he or she should sign in the presence of a witness.

The *Power of Attorney Act* should also deal with the possibility that the donor may not able to sign personally. That is already dealt with in section 13 (4) of the *Representation Agreement Act*, in most the modern statutes on enduring powers (Alberta Act, s. 1 (1) (b); Manitoba Act, s. 10

(2), and see the Nova Scotia Report (Recommendation 3) and the Saskatchewan Consultation Report (Recommendation 8)). There are some differences on detail, but the general thrust of the legislation and the recommendations may be summarized as follows:

(1) the donor must be physically incapable of signing. The Manitoba Act also provides and the Saskatchewan Consultation Paper recommends that some one else be able to sign where the donor cannot read. That does not seem to be necessary, for one would expect the contents of the instrument will be explained to the principal, and he or she, if physically capable, can then sign;

(2) the donor must direct that the other person sign and that person must then sign in the donor's presence;

(3) the signature must be witnessed as if the donor were signing;

(4) the attorney and the attorney's spouse may not sign on behalf of the donor. The *Representation Agreement Act* also provides that a witness may not sign for the adult. It may also be wise to provide that any person who is prohibited from witnessing the donor's signature should not be able to sign for the principal. This would add an element of complexity, but principals will generally sign for themselves and having someone sign for the principal is potentially dangerous (see Alberta Discussion Report, 37-38). Any added requirement in this respect will not affect the normal execution process.

(c) Witnesses

In Chapter III it was noted that there is a tendency, based on the Ontario legislation, to require that there be two witnesses to the donor's signing and that they sign the document. However, it was concluded that there is no clear advantage to a second witness, and some, perhaps minor, disadvantage. The present law should not be changed.

(d) Prohibited witnesses

If a donor has be advised by a lawyer or some other designated person, the question of who may or may not act as a witness is of lessened importance (Alberta Discussion Report, 43). If the recommendation that there be no need to involve lawyers or other designated persons in the preparation of powers is implemented, then the question becomes more significant. Nonetheless, any prohibitions should be clearly justifiable. A long list of prohibited witnesses is to be avoided, for in the end it may serve no purpose and it will increase the risk of a power being invalid.

One of the functions of a witness is to give at least some *prima facie* assurance that the power is voluntarily executed. It is therefore desirable not to have as witnesses people who might be thought to have an interest in the creation of the power, or who might benefit under it.

All jurisdictions prohibit an attorney, and all except New Brunswick the attorney's spouse, from being a witness. At common law only the donor can benefit under a power. These prohibitions must therefore be based on the pe. ,ption that some attorneys – perhaps family members - might pressure a reluctant donor into creating a power. Moreover, third parties may be apprehensive if the attorney or the attorney's spouse is a witness.

The Alberta Act also prohibits a person who signs for the donor and that person's spouse from acting as witnesses (section 3.1(d),(e). For the same reasons as apply in the case of attorneys and their spouses, that is a wise precaution.

It will be recommended in Recommendation 12 that, subject to a contrary intention in the power, the spouse and dependant children of the donor may benefit under the power. It would clearly seem desirable that they should not be witnesses. For the sake of simplicity, the prohibition should apply whether or not they are excluded as beneficiaries by the terms of the power.

The *Representation Agreement Act* goes further than any other legislation. As well as excluding representatives and their spouses, it excludes the parents, children, employees and agents of a representative; anyone under the age of 19; and anyone who does not understand the type of communication used by the adult (section 13 (5)).

The exclusion of people under the age of 19 would not seem to be needed. Adults will almost inevitably be witnesses in any event. There is no good reason to automatically invalidate a power just because the witness is under 19; such a person may be a perfectly competent witness. There is no prohibition in the *Wills Act*, R.S.B.C. 1996, c. 489, against a person under the age of 19 being a witness, and that does not appear to have been the source of any difficulty.

If the spouse of an attorney is prohibited from acting as a witness, one can see in theory the argument for excluding the attorney's parents, children, employees and agents. Equally, one can understand the reason for excluding someone who does not understand the type of communication used by the adult. However, one should not add to the list of excluded witnesses unnecessarily. On balance, they should in general be confined to those persons who have some direct interest in the power.

(e) Signature or certificate of the attorney

A representative under a representation agreement must, as the law now stands, sign the agreement and complete a certificate; *Representation Agreement Act*, ss. 5 (4); 13 (2). Some jurisdictions outside Canada require in the case of an enduring power of attorney either that the attorney sign the power or expressly acknowledge his or her agreement to act; see for example, *English Act*, s. 2 (1) (b), SI 1990/1376, Schedule, Part C.

The CBA BC Report recommended that the attorney execute an affidavit stating he or she was aged 19 or over, had read and agreed to comply with a list of duties and to provide accounts and other information to the Public Trustee on demand. The BC Report (1975) (22) made a like recommendation, but with the proviso that a failure to comply with it would not render the power void. However, neither of these recommendation were ever implemented, and no Canadian jurisdiction has such a requirement. The Manitoba (1994) and Nova Scotia Reports and the Saskatchewan Discussion Paper did not even discuss the matter (though the Manitoba Report (1974) had recommended in favour of it). The Alberta Discussion Report (38-39) did consider the matter, but recommended against any such requirement. It thought that it would be wrong to hold a power invalid if such a requirement was not complied with, and that it could cause complications, for example where there are two attorneys.

On balance the case for making it mandatory that the attorney sign the power or prepare a certificate is not compelling.

RECOMMENDATION 9

(1) Subject to the amendments to the Act recommended in (2), (3) and (4), no change be made in the requirements for the execution of a enduring power of attorney.

(2) A person may sign on behalf of a donor if:

(a) the donor is physically incapable of signing;

(b) the donor directs that the other person sign on his or her behalf and the person sign in the presence of the donor;

(c) the signature is witnessed as if the donor were signing;

(d) the following persons do not sign for the donor: the attorney, the attorney's spouse, a witness, any person prohibited from acting as a witness.

(3) The following persons should be prohibited from acting as a witness: the attorney; the attorney's spouse; a person who signs for the donor and that person's spouse; the donor's spouse and children.

(4) The execution requirements should apply to variation of powers.

D. TERMS OF THE POWER

1. Commencement – springing powers

At common law a power of attorney becomes operative as of the date of its execution, unless there is a contrary provision in the document. There may be some advantage to the general rule in the case of enduring powers. It gives the attorney some discretion as to when he or she may act, allowing for a gradual deterioration of a donor's capacity and ruling out the need for a "bright line" determination (see B.C. Report (1990) 110, 5-6). It does, however, mean that an

attorney could act while the donor is capable. In the case of enduring powers of attorney, the intent will often be that the attorney will not exercise his or her authority until the donor is incapable of managing his or her affairs. That objective may be achieved in one of two ways.

The power may be held in escrow by a person chosen by the donor, with instructions to release the power to the attorney on the happening of a specified event. This will generally be a designated person notifying the person who has custody of the power that the donor is now incapable of managing his or her affairs. This system appears to work well. It has one great advantage – third parties dealing on the faith of the power can take at its face value. They do not need to worry about whether some "triggering" event has or has not happened. In theory it has a potential defect. A power might for some reason or other be prematurely released and improperly used. That, it would seem, does not happen.

The other way to proceed is to create what is often referred to as a "springing power", that is, to provide on the face of the document itself that its coming into force is contingent on some specified event, usually in the case of enduring powers the incapacity of the donor. That was possible at common law, and has received, or has been recommended for, statutory recognition both inside and outside Canada. Within Canada, see: Alberta Act, ss. 5, 6; Manitoba Act, ss. 6-9; Ontario Act, ss. 7(7), 9(3); B.C. Report (1990); Nova Scotia Report (22-24); Saskatchewan Consultation Paper (Recommendations 11, 12, 13).

Objections have been made to springing powers. The attorney may have difficulty in deciding if the event that will bring the power into operation has happened. (However, it would seem a similar issue could arise in proceeding by way of escrow.) Because the contingency appears on the face of the power, third parties will have to satisfy themselves that the power is indeed operative, and that will hinder the use of the power.

Recent legislation goes a fair way to deal with these issues. The Alberta Act gives a good idea of what can be done. Section 5 of the Act provides in summary:

(1) An enduring power may provide that it comes in to effect at a specified time or on the happening of a specified event, including, but not limited to, the incapacity of the donor;

(2) A person (who may be the attorney) may be designated in the power and that person's written declaration that the event has happened is conclusive evidence that it has occurred;

(3) If the event is the incapacity of the donor, and the specified person cannot or will not act, a written declaration by two medical practitioners that the event has happened is conclusive evidence that it has occurred.

Section 6 supplements section 5 by authorizing the release of medical information about the donor so far as that may be needed to make any determinations under section 5.

There may be an element of complexity in this scheme. However, it is workable. In accordance with the general philosophy of giving people the choice of fashioning their arrangements as they see fit, provision should be made for springing powers. That would not of course prevent those who wish to proceed by way of escrow from doing so.

RECOMMENDATION 10

Provision, modelled on sections 5 and 6 of the Alberta *Powers of Attorney Act*, be made in the Act for springing powers.

2. Authority of the attorney

(a) General provision

There are two ways in which the legislation describes the authority that may be conferred on an attorney under an enduring power of attorney.

Some Acts use traditional language, saying that the power may confer on an attorney either general or specific authority in relation to anything that a donor can lawfully do by attorney. This is the language used in section 9 and Forms 1 and 2 of the *Power of Attorney Act* and in section 9(1) (g) of the *Representation Agreement Act*. Similar language is also used in the Alberta (s. 7(1) (a)), Prince Edward Island (s. 2) and the English (s. 3(2)) Acts. The conventional wisdom is that that authorizes an attorney to do all that a donor could do himself or herself, except make a

will. Other types of testamentary dispositions may also fall within the exception. That might include such things as the making of nominations under insurance policies or under pension plans.

It may be objected that this suggested language is a bit archaic and would not mean too much to the non-lawyer. Section 7 (2) of the Ontario Act uses more modern and transparent language:

> "The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will."

Section 7 (2) preserves the common law exception against the making of wills, but it may by implication permit an attorney to make other types of dispositions that might be classified as testamentary. That is perhaps not desirable. It would be difficult, if not futile, to attempt a definition of what, other than a will, is a testamentary document. If the section 7 formula were to be used and the prohibition extended to other testamentary instruments, perhaps the best that can be done is exclude wills and other testamentary documents, naming, not as an exclusive list, some specific documents. If that were done there would not be too much difference between the two statutory formulae.

There is an attraction in the language of the Ontario Act. However, the more traditional language has been used for years without, it would seem, having been a source of trouble, and it was presumably thought to be adequate when it was incorporated into section 9 (1) (g) of the *Representation Agreement Act*. On balance, therefore, it is probably wiser to retain it.

RECOMMENDATION 11

> The Act should be amended to provide that an enduring power of attorney may confer on an attorney the authority to do anything on behalf of the donor that a donor can lawfully do by attorney.

(b) Dispositions to persons than the donor

As a matter of general principle, an attorney must act solely for the benefit of the donor, and may not use his or her powers for the benefit of others, including, in particular, the attorney himself or

herself. Some legislation provides, and some Reports recommend, modifications of that rule (subject always to a contrary intention in the instrument). There are two categories of case.

(i) *People owed a legal or "moral" obligation*

Some legislation provides an attorney with authority to make provision for people to whom the donor owes a legal obligation, or more generally for people who might have been expected to have been provided for by the donor. Two matters need to be considered, should a provision of this nature be included in the legislation at all, and if it should, what form should it take?

A good case may be made for having some provision in the legislation. It is a reasonable assumption to make that donors, particularly if they do provide financial support to other people, would in some cases at least want that support to continue. If that be so, the question is how is this provided for in a statute. The existing legislation in other jurisdictions deals with it in a variety of ways.

If in the end the legislation does no more than authorize the attorneys to do what they would be legally obliged to do, there may not be much point in putting a provision in the legislation. The Manitoba (s. 23) and Ontario (s. 37 (1), (2)) Acts would seem to be of this nature. The Nova Scotia Report (30–32) recommends that that an attorney may provide reasonable support and maintenance for dependants of the donor. Depending on what is meant by dependant, that may go no further than the legislation in Manitoba and Ontario.

Other legislation is more expansive. The English Act (s. 3 (4)) authorizes the attorney to provide for another person if the donor might have been expected to provide for the other's needs, and to make that provision at the level that the donor would have made it. That has the virtue of being all encompassing. But it is of necessity vague, and imposes what at times could be a rather heavy burden on the attorney. Moreover, there is something to be said for keeping a statutory power to dispose of the donor's property to others within fairly circumscribed bounds.

The Alberta Act (s. 7 (b)) provides that the attorney's authority may be exercised for the "maintenance, education, benefit and advancement" of the donor's spouse and dependant children. The Saskatchewan Consultation Paper (Recommendation 31) endorses that approach.

Section 7 (b) goes beyond what an agent, acting on behalf, of a donor, might be legally obliged to do, but does not enable provision to be made for other people whom it might be expected a principal might want to help, for example, grandchildren. However, for reasons suggested above in discussing the English legislation, there are good grounds for not over-extending the statutory power.

If provision is to be included in any legislation, the Alberta Act is a good model to follow. Whatever provision is adopted, it should incorporate the following two features. First, the power to benefit others should be subject to the primary obligation of the attorney to provide for the principal; see the Ontario Act, s. 37 (1), (2). Second, if the attorney falls within the group of persons who may be benefited, the attorney may exercise the power in his or her own favour. That has its obvious dangers, but jurisdictions that have dealt with the issue have concluded that it would be unfair to deprive the attorney of the benefit of the provision: see the Alberta (s.7 (1) (b)) and English (s. 3 (4)) Acts. An inference that an attorney may benefit himself or herself may be drawn from section 37 (1), (2) of the Ontario Act, though the matter is not entirely clear.

RECOMMENDATION 12

> The Act be amended to provide that, subject to a contrary intention appearing in the instrument, an attorney under an enduring power of attorney should have the authority to provide for the maintenance, education, benefit and advancement of the donor's spouse and dependant children, including the attorney if he or she is a spouse or dependant child. The power would however be subordinate to the obligation to make appropriate provision for the principal.

(ii) *Gifts, including gifts to charity*

Some legislation authorizes an attorney, subject to various limitations, to make gifts to friends and relatives of the donor, or to charity; Ontario Act, ss. 37 (3), (4), (5), 38 (2); English Act, s.3 (5). In British Columbia, the regulations permit donations to be made to charity under an agreement made under section 7 of the *Representation Agreement Act*; see B.C. Reg. 199/2001, s. 2 (1) (v).

If gifts, including gifts to charity, are to be authorized it should be done as matter of legislative decision and not regulation. But it may be seen to be going somewhat far for even a statute to authorize an attorney to be philanthropic at the donor's expense. The Alberta Discussion Report (77), the Manitoba Report (1994) (23) and the Nova Scotia Report (31) recommended against any such provision. If a donor wishes to confer such an authority, it is better that it be done expressly in the power itself. Donors may do this already, so there is no need for any legislation.

RECOMMENDATION 13

> No provision should be made in the Act authorizing an attorney to make gifts, including gifts to charity.

E. DUTIES

1. Duties

The duties of an attorney are now found in common law and equity. So far as the matter is dealt with at all, there are essentially two approaches in the Acts and Reports on how legislation should provide for those duties.

The Alberta Discussion Report (66) said that the duties of an attorney were well known, and in general did not need to be set out in a statute. The Alberta Act followed that recommendation. The Manitoba Report (1994) and Act take substantially the same position. The Newfoundland Act does not take things much further. Section 6 states that an attorney shall act in the best interests of the donor, and shall be considered to be a trustee. That does not tell someone who reads the statute much about the duties of an attorney, and potentially introduces some complication by classifying the attorney as trustee. The Alberta Discussion Report (69-70), B.C. Report (1975) (31) and the Nova Scotia Report (25-26) rejected the idea that attorneys should be stated to be trustees.

The other approach is to set out in the legislation at least what may be regarded as the basic duties of an attorney. Examples of this are found in the Ontario Act (s. 32), and in the Nova Scotia (27-28) and Saskatchewan Reports (Recommendations 28, 29, 30, 31). The prime reason

for this approach is that it would be advantageous for non-lawyers. There is no place where they can now find a succinct statement of attorneys' duties.

On balance there some advantage in dealing with the attorney's basic duties in the Act. However, there would need to be two qualifications on any statutory list.

First, any list will almost inevitably be incomplete, and so it should be stated in the legislation that it does not exclude the application of other applicable rules of law and equity. It may be said that this defeats the object of having a statutory statement. However, if the statute states the fundamental rules, that will give attorneys a good idea of their core duties, and one would not want to unwittingly exclude other salutory non-statutory rules.

Second, in most cases donors should be able to exclude or vary the statutory duties (as donors may now exclude or vary common law and equitable rules). One would suspect that given the nature of the duties donors would often not want to exclude them, but that will not always be the case. In any event it is an option that in general should be open to a donor. There are, however, some fundamentals which should not be open to exclusion or variation, and it is very doubtful if donors would ever wish to do so. But if the Act is to state which duties may be varied, it needs to expressly state those which may not.

RECOMMENDATION 14

The Act should set out the following duties of the attorney under an enduring power of attorney, with a proviso that they not be regarded as an exclusive list, and with a proviso, as indicated, as to whether the duty may be varied or excluded by the power;

(1) Duties that may not be excluded by the power:

(a) to act honestly and in good faith;

(b) to act within the authority given by the instrument;

(c) to keep accounts and other records concerning the exercise of the attorney's powers (but the instrument may provide for the manner and detail in which accounts and records are kept);

(2) Duties that may be excluded or varied by the power:

(a) to act solely in the best interests of the donor, subject to any power to provide for a spouse or dependant child;

(b) to adhere to the appropriate standard of care. There is, it seems, at common law, a difference between what is expected of the unremunerated and remunerated attorney, and that should be reflected in the legislation. Section 32 (7), (8) of the Ontario *Substitute Decisions Act* provides a model. It states that an unpaid attorney "shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs"; a paid attorney " the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise".

(c) not to benefit personally from the position of attorney or from the exercise of the power, nor to confer any benefit on any other person than the donor. This would be subject to any statutory power to benefit the spouse and children of the donor;

(d) not to delegate any authority conferred by the instrument or arising as a matter of law;

(e) to keep the donor's and the attorney's assets separate, except to the extent that is impossible because both have an interest in the same asset.

2. When do the duties arise

The conventional view is that, in the absence of any provision to the contrary, an attorney appointed under a power of attorney has the power but not the duty to act. In the case of enduring powers of attorney, that is hardly satisfactory. As the British Columbia Law Reform Commission put it (B.C. Report (1975), 31):

> "... it is desirable that, at some point, certain positive duties be cast upon enduring attorneys to act for the benefit of their principals. Without some underlying

> requirement of this nature the appointment of an enduring attorney may be an act of futility on the part of the principal."

It may be objected that it is unfair to impose a positive duty to act on someone who will often be a friend or a member of the family of the donor, and who will likely not be receiving any payment. Any vacuum can always be filled by an application under the *Patients Property Act*. However, if the attorney has acted or has otherwise indicated that he or she is prepared to accept the appointment, then it does not seem unreasonable to expect that the attorney's duties will be carried out. If the attorney does not wish to act, he or she should formally decline the appointment or resign rather than simply standing by doing nothing.

Assuming a duty to act, the difficult thing to decide is when the duty should arise. The general pattern of legislation and recommendations suggest that two conditions must be satisfied: see Alberta Act, s. 8; Manitoba Act, s. 19 (1); Nova Scotia Report, 24-26.

First, the attorney must have either acted or otherwise indicated that he or she is prepared to accept the appointment. The Ontario Act (s.38 (10)) would seem to dispense with that requirement. But an attorney cannot be compelled to accept an appointment, and it would be unfair to place a duty to act on a person who has never agreed to act in the first place. It may on occasion be difficult to decide if an attorney has in fact agreed to accept an appointment, but that is the type of factual problem that is not uncommon. If such a provision as that being discussed were adopted, it would be a practical reason for an attorney to sign a statement accepting the appointment, even if that is not required as a matter of law.

Second, the attorney must have reasonable grounds to believe that the donor is incapable of managing his or her affairs. While the donor is capable there is no need to impose any duty to act on the attorney. However, as the British Columbia Law Reform Commission noted, the very essence of an enduring power is that the attorney will act when the donor cannot do so.

RECOMMENDATION 15

> The Act should be amended to provide that, subject to a contrary intention in the instrument, in the case of an enduring power of attorney, an attorney should be under a duty to act if he or she has acted under the power or has otherwise accepted the

appointment, and has reasonable grounds to believe that the donor is incapable of managing his or her affairs.

F. ENFORCEMENT OF OBLIGATIONS

It is one thing to state that obligations are imposed on an attorney; it is another to ensure that those duties are carried out. There are two general ways in which that might be done. The first is to subject the actions of attorneys to some ongoing form of periodic scrutiny. That might ensure that if there was misconduct on the part of an agent, it would be discovered relatively quickly. The second is to have in place mechanisms (other than periodic scrutiny) for dealing as quickly as possible with actual or suspected misconduct. The obvious bodies who might be charged with these tasks are the Public Guardian and Trustee and the courts.

1. Periodic scrutiny of accounts

One way in which attorneys might be subject to periodic scrutiny is to require that they file on a regular basis accounts with a specified person or body.

In one of its proposals the CBA BC Report favoured annual accounting to the registrar of a proposed registry. Section 22 of the Manitoba Act provides for an accounting when the attorney knows or ought reasonably to know that the donor is mentally incompetent. The donor may name someone in the power to whom an accounting must be provided *on demand*; if such a person is not named, and in some cases even if there is a nomination, the attorney must account annually to the "nearest relative". However, section 22 (3) contains an important qualification on the accounting obligation; the person receiving an account is under no duty or liability with respect to it. The Manitoba Report (1994) argued it would be unfair to expose people who received accounts to liability for they will be acting gratuitously and will not be able to refuse an appointment. This robs the requirement of much of its value. If periodic scrutiny is to be effective the person provided with accounts surely must be put under an obligation to analyse them, and if need be take action. (The Nova Scotia Report (32-35) adopts the Manitoba approach, though it is not clear if the intent is absolve the person receiving the accounts from any duty to act.)

B.C. Report (1975) (19-20) rejected the idea of mandatory accounting. It recognized the lack of such a requirement might increase the risk to which a donor is exposed, but thought that to impose it would take away from the enduring power of attorney the simplicity which is one of its attractive features. The Alberta Discussion Report (72) and Report (14) considered and rejected a proposal to require annual filing of accounts with the court. The Manitoba Report (1994) (19) and the Saskatchewan Consultation Paper (44) rejected the idea that there should be annual filings with the Public Trustee. The Manitoba Report looked at the issue from the standpoint of the Public Trustee. The requirement would make sense only if the Trustee had the obligation to examine and act, the costs of that would be enormous and the Commission thought it would be irresponsible to make such a proposal. The Saskatchewan Paper approached it from the standpoint of the attorney. Fraudulent attorneys would not file or would file fraudulent accounts. Filing would impose a burden on the honest attorney in terms of time and on the assets of the donor in terms of money.

A person creating a representation agreement or an enduring power may, of course, expressly provide for some form of periodic accounting. However, there appears to be little support for imposing such a requirement as a matter of law. Manitoba, which does require it, robs it of much of its value by relieving the person to whom the report must be made of any obligation to act on it. The Saskatchewan objection to compulsory filing of accounts has much to commend it

RECOMMENDATION 16

> There is no need for a provision requiring an attorney under an enduring power of attorney to provide periodically accounts to a specified person.

2. The Public Guardian and Trustee

(a) Investigations

Under section 17(1) of the *Public Guardian and Trustee Act*, the Public Guardian and Trustee may investigate and audit the affairs, dealings and accounts of (1) a trust, a beneficiary of which is a young person or an adult who falls into defined classes; (2) an attorney; (3) a representative; and (4) a decision maker or guardian. Before investigating, the Public Guardian and Trustee

must have "reason to believe that the interest in the trust, or the assets of the young person or adult, *may* be at risk, or that attorney, representative or decision maker or guardian *has* failed to comply with his or her duties" (emphasis added). Four comments may be made on this proviso.

First, the Public Guardian and Trustee may act in the case of a trust if the assets may be at risk, but not, at least not in express terms, if a defalcation has already occurred; though if a defalcation has occurred in most cases that will be a sufficient basis for drawing a conclusion that the assets are at risk. On the other hand, in the other three cases, including that of an attorney, action can be taken only if a breach of duty has occurred, but not in anticipation of a breach.

It would obviously be better if the Act was comprehensive. It could provide that before an investigation may take place there must be reason to believe that a breach of duty has or may have taken place, is or may be occurring, or may take place.

Second, even if there is reason to believe that a breach of duty has taken, is taking or may take place, the Public Guardian and Trustee is under no obligation to investigate. At first glance, that seems odd. Surely there should be a duty to investigate in such circumstances. But there are at least two reasons for thinking investigations should not be mandatory. In some cases it may be possible to resolve the issues that have arisen simply and cheaply without a formal investigation. Investigations can be lengthy and time consuming and it would be unwise to make them mandatory if the resources are not likely to be available to put the recommendation into effect. It would be better, therefore, to provide that, if there is reason to believe there is a breach of duty, the Public Guardian and Trustee may take such action to deal with the matter as he or she deems expedient, including the undertaking of an investigation.

Third, in contrast to section 30 of the *Representation Agreement Act*, the *Public Guardian and Trustee Act* does not specifically deal with the complaints made to the Public Guardian and Trustee. Section 30(3) provides that the Public Guardian and Trustee must review a complaint to determine its validity and advise the complainant of the outcome of the review. This is the practice of the Public Guardian and Trustee if a complaint is lodged about an attorney. There would be some value in stating this in the legislation.

Fourth, the *Public Guardian and Trustee Act* does not state what may be done if on investigation it is concluded there is a breach of duty. It would probably be desirable if the Public Guardian and Trustee, in addition to any other action that might be taken, were authorized to make an application to court for any order which fell within the court's jurisdiction.

It should perhaps be noted that all of this assumes the continued existence of that part of section 17(1)(b), which provides the Public Guardian and Trustee may act only if there is reason to believe that the donor is incapable of managing his or her affairs. Given the factual difficulties that can arise, the one change that could be made is to provide that action may be taken if there is reason to believe that the donor is *or may be* incapable.

The recommendation set out below is made solely in terms of enduring powers of attorney. A parallel recommendation is made later with respect to representatives. Neither may be appropriate for the other investigations that may be made under section 17, and the recommendations should not be read as referring to them.

RECOMMENDATION 17

In relation to enduring powers of attorney, section 17(1) of the *Public Guardian and Trustee Act* be amended to provide:

(1) If the Public Guardian and Trustee has reason to believe that the donor is or may be incapable and that a breach of duty by an attorney has or may have taken place, is or may be occurring, or may take place, the Public Guardian and Trustee may take such action as he or she in his or her discretion sees fit, including the carrying out of a formal investigation;

(2) If the Public Guardian and Trustee concludes that there is a breach of duty he or she may apply to court for any order within the court's jurisdiction.

(b) Complaints

Under both section 17 of the *Public Guardian and Trustee Act* and section 31 of the *Representation Agreement Act* the Public Guardian and Trustee may act even if no complaint has

been lodged. Often, however, it will be a complaint which prompts an investigation. People may be inhibited from lodging complaints for two reasons.

Some may be worried about potential liability. It would therefore be useful to provide (in both Acts) that a person who, in good faith, informs the Public Guardian and Trustee that misconduct has or may have taken place, is or may be occurring, or may take place, is not subject to any liability.

Financial institutions have a further concern, that they could be in breach of their obligation of confidentiality to a client if they disclose information to the Public Guardian and Trustee. The legislation is inconsistent in its treatment of the issue. Under section 18 of the *Public Guardian and Trustee Act*, a person may be compelled to release confidential information to the Public Guardian and Trustee, and is protected from suit for doing so. The Act provides no protection for someone who volunteers information to the Public Guardian and Trustee. Subject to a good faith requirement, a person who, voluntarily or under compulsion, discloses information to the Public Guardian and Trustee should not be subject to any liability solely because that information is confidential.

RECOMMENDATION 18

The Act be amended to provide:

(1) A person who in good faith lodges a complaint relating to an enduring power of attorney with the Public Guardian and Trustee shall not, simply because of the lodging of the complaint, be subject to liability;

(2) A person who in good faith lodges a complaint relating to an enduring power of attorney with the Public Guardian and Trustee shall not be subject to liability for disclosing confidential information if the lodging of the complaint requires the disclosure of that information.

3. The Courts - Passing of Accounts.

The courts have of course a wide range of authority with respect to attorneys. Any changes to the *Power of Attorney Act* should not be seen as detracting from that authority.

A court has an inherent jurisdiction to require an attorney to pass his or her accounts. The donor and the attorney have standing to make an application. So also would a committee, or the personal representative of a deceased donor.

Some Acts have supplemented, and the proposals of some law reform bodies recommend supplementing, the common law. All are agreed that standing to bring on an application should be conferred on people other than the donor. Who may apply varies; it may be specified people, "interested" parties, anyone with the leave of the court, or a combination of those groups ; see Alberta Act, s.10; Manitoba Act, s. 24; Newfoundland Act, s. 10; Ontario Act, s. 42; P.E.I., s.9; Saskatchewan Consultation Paper, Recommendation 33. At first glance, conferring a power to apply on "interested parties" or anyone with the leave of the court might seem to potential source of difficulty. However, under sections 2, 4 and 6 of the *Public Guardian and Trustee Act*, as well as specified persons, any "other person" may apply. That quite open-ended provision does not appear to have caused problems.

The circumstances in which an order may be made and the period an accounting may cover also varies. Prince Edward Island provides that an application may be made only if the principal is incapable, and the accounting is confined to the period of incapacity. Alberta and Newfoundland require, and the Saskatchewan Paper recommends, that the principal be incapacitated, but do not limit the accounting to the period of incapacity. This seems the preferable of the two positions. An attorney may have been acting improperly, but not have been called upon to account while the donor was capable. Once an application is made, a court should at least have a discretion to subject as much of the actions of the attorney to scrutiny as seems appropriate.

The Manitoba and Ontario Acts could be read as dispensing with the need that the principal be incapable. The Alberta Discussion Report (73-74) expressly rejected this latter position, and, it is suggested, rightly so. The Report said there was no reason to confer standing on others if the donor was capable, and it would be an invasion of the donor's privacy to do.

RECOMMENDATION 19

> The Act be amended to provide that the Public Guardian and Trustee, an interested party or any other party with leave of the court may apply to court for an accounting with respect to an enduring power of attorney, provided that the court shall have jurisdiction to entertain the application only if there is reason to believe the donor is incapable of managing his or her affairs.

G. TERMINATION

Particularly, though not exclusively, when the donor may be incapable, it is useful to have as clear a statement as possible of the circumstances in which a termination of either the enduring power of attorney or of the authority of the attorney may occur. Terminations may be considered in relation to the donor, the attorney and the court.

1. The donor

(a) Revocation

A capable donor may revoke a power. This may be understood by lawyers, but it is apparently not always by non-lawyers. There is therefore some advantage in stating it in the legislation.

The Alberta Act (s. 13 (1) (a)) provides that a donor may terminate the power if the donor understands the nature and effect of the termination. This, it is suggested, is preferable to the *Representation Agreement Act* (s. 27) and the Ontario Act (s. 8(2)). They require that in order to revoke the donor have the capacity to make a representation agreement or grant a power. While it may often make little difference in practice, the understanding of the donor should be related to the particular transaction in question, in this case termination.

(b) Bankruptcy of the donor

At common law, it appears that a power of attorney terminates on the bankruptcy of the donor; Manitoba Report (1994), (29). The Alberta Discussion Report (103), the Nova Scotia Report (38-40, Recommendation 16) and, it would seem, the Saskatchewan Consultation Paper

(Recommendation 27 and preceding text) recommend that the power not be terminated on bankruptcy. The prime reason is that there still may be matters that the attorney may need to deal with. However, as the Manitoba Report (1994) notes, once an assignment in bankruptcy takes place, the trustee in bankruptcy takes control of the donor's financial affairs. It would seem in those circumstances that the power should terminate.

Given the position at common law there may be no need to state in the legislation that a power does terminate on the bankruptcy of the donor. However, in light of the contrary recommendations in other jurisdictions, it may be useful to affirm it in the statute.

(c) Marriage breakdown

Section 29 (1) (d) of the *Representation Agreement Act* provides that, subject to the terms of the agreement, if the maker of an agreement and the representative are spouses, an agreement comes to an end on the termination of their marriage or marriage like relationship. Termination of the marriage or relationship is defined by relation to section 56 of the *Family Relations Act*, R.S.B.C. 1996, c. 128.

With one qualification, a similar provision should be adopted for continuing powers. The qualification relates to the contrary intention in the instrument. Under section 29 (1.1) of the *Representation Agreement Act*, a contrary intention is effective only if the maker consults a lawyer or other designated person, and that person completes a certificate. There should be no such requirement with respect to continuing powers.

(d) Death of the donor

The death of the donor obviously terminates any power.

RECOMMENDATION 20

The Act be amended to provide that an enduring power of attorney terminates on:

(1) the donor, while capable, delivering a written notice of revocation to the attorney or attorneys;

(2) the donor, whether capable or incapable, becoming bankrupt;

(3) subject to the terms of the power, the breakdown of the marriage or marriage-like relationship of the donor (whether the donor is capable or incapable) if the spouse of the donor is the attorney;

(4) the death of the donor.

2. The attorney

There are two issues that arise with respect to attorneys, first, when is it appropriate for the authority of an attorney to be terminated, and second, what should be the consequences of the termination of that authority.

(a) Termination of authority

(i) *Renunciation and resignation*

As was seen earlier, at common law an attorney is under no obligation to act. Nonetheless, if an attorney has been named, and he or she does not intend to act, it is desirable to indicate that by way of a formal renunciation. It was recommended that in the case of enduring powers of attorney, an attorney should come under a duty to act if he or she has acted or otherwise indicated an acceptance of the appointment and has reasonable grounds to believe that the donor was incapable of managing his or her affairs. If the attorney has come under a duty to act, it is even more desirable that there be a formal resignation.

It is therefore recommended that while the donor is capable an attorney who wishes to renounce or resign should do so by written notice to the donor.

If the donor is incapable, but the attorney has not come under a duty to act, the attorney should file a written renunciation with any other attorney named in the power, or if there is no such attorney, with a designated relative, and failing that, with the Public Guardian and Trustee. If the attorney has come under a duty to act, then the attorney should be able to resign only with the consent of the court, and should remain under a duty to act until that resignation is approved; see

the Alberta (s.12) and Manitoba (s.21) Acts; Nova Scotia Report (38-40, Recommendation 16); Saskatchewan Consultation Paper (Recommendation 27 and preceding text, endorsing the general approach of the Alberta Act).

(ii) *Incapacity*

It seems obvious that a person who lacks capacity should no longer act as an attorney; the Acts in Alberta (s. 13 (1) (f)), Manitoba (s. 13 (1) (a)) and Ontario (s. 12 (1) (a)); *Representation Agreement Act*, s. 29 (1); Nova Scotia Report (Recommendation 16); Saskatchewan Consultation Paper (Recommendation 27).

(iii) *Bankruptcy of the attorney*

At common law the bankruptcy of the attorney did not necessarily terminate the power or the authority of the attorney. The Manitoba Report (1994) (30), however, suggested that in the case of an enduring power, an incapable donor requires protection against a bankrupt attorney. The Manitoba Act (s. 13 (1) (d)) therefore provides that the authority of the attorney terminates on bankruptcy. The Nova Scotia Report (Recommendation 16) adopts this position.

The other jurisdictions do not deal with the bankruptcy of the attorney, presumably retaining the common law position. The Alberta Discussion Report (Recommendation 36) made a specific recommendation against the changing the law, and the Saskatchewan Consultation Paper apparently adopts that view; see Recommendation 27 and the preceding text. The Alberta Report thought that any interested party could always apply to court. Depending on the law, the court could appoint either a new attorney or a committee.

It was recommended earlier that no prohibition should be placed on a bankrupt being named as an attorney at the outset, but that the courts should have a general jurisdiction to remove an attorney who for any reason was thought to be an inappropriate person to act. Given that recommendation and the common law position, it suffices to rely on the power of the courts to remove.

(iv) *Death*

If an attorney dies, the issue that arises is whether that terminates the power of attorney or only the authority of the attorney.

(b) Consequences of attorney ceasing to act

The power itself may deal with one or more of the circumstances in which it is suggested the authority of the attorney should be terminated, and to the extent that it does its provisions should of course prevail. Moreover, it was suggested earlier that if there are two or more joint attorneys, and for any reason one ceases to act, the remaining attorney(s) may continue to act, subject to a contrary provision in the power.

If the power is silent and there is no other attorney competent to act, then matters can get somewhat more complicated because of the number of possible permutations of events. There are two general sets of circumstances.

The events may happen while the donor is capable and aware of what has happened. He or she may then of course decide what action to take.

The events may happen before the donor becomes incapable, but the donor take no action, or the events may happen after the donor has become incapable. While there are considerable differences in detail, the legislation and the Reports deal in two different ways with the consequences of there being no continuing attorney. In some jurisdictions, the power of attorney itself is terminated, and presumably it will then become necessary to appoint a committee (or its equivalent in other jurisdictions); see the Alberta (s. 13 (1)) and Ontario (s. 12) Acts, the *Representation Agreement Act*, s. 29, the B.C. Report (1975) (22) and the Saskatchewan Consultation Paper (Recommendation 27). In other jurisdictions, the courts have the discretion to appoint a new attorney, or terminate the power, in which case it will again be necessary to appoint a committee; see the Manitoba Act, s. 13, 24 (1) (c), (g); the Newfoundland Act, s. 9 (1) (bankruptcy); Nova Scotia Report, Recommendation 16.

The reasons for suggesting that the court should not have the power to appoint substitute attorneys are neatly summarized in the Alberta Discussion Report (94 –95). In its view, the key

element in the power of attorney is that the donor has selected the attorney, and presumably has trust in the person selected. Moreover, donors generally create powers to avoid the intervention of the courts. When those people appointed by the donor will not or cannot act, and of necessity the assistance of the court is required, the *raison d'etre* of the power is gone. It is better in those circumstances to terminate the power, and handle matters under the court's statutory powers to appoint committees.

On the other hand, it may be argued that if an attorney cannot or will not act, it is wrong to assume that a donor would prefer a committeeship to a court appointed attorney. If the power has been working well and there is a person well qualified to act, it may be simpler and more appropriate to appoint a new attorney. Although the analogy may not be perfect, the courts already exercise a jurisdiction of this nature in relation to wills and trusts. This approach gives the court a broad discretion as to how proceed, and seems the preferable of the two alternatives.

RECOMMENDATION 21

(1) The Act be amended to provide that in the case of an enduring power of attorney:

(a) While the donor is capable an attorney may renounce or resign an appointment by delivering a written notice of renunciation or resignation to the donor;

(b) If the donor is incapable and the attorney has not acted or otherwise indicated acceptance of the appointment the attorney may renounce or resign by delivering a written notice of renunciation of resignation to (i) any remaining attorney, or (ii) if there is no remaining attorney to a parent, spouse, adult child or adult sibling of the donor, or (iii) if there are no such persons or they cannot be located, to the Public Guardian and Trustee;

(c) If the donor is incapable and the attorney has acted or otherwise indicated an acceptance of the appointment the attorney may resign only with leave of the court.

(2) The *Patients Property Act* be amended to provide that if a donor of an enduring power of attorney is incapable of managing his or her financial affairs, an attorney ceases to act and there is no continuing attorney, the court on application may appoint a new attorney, or appoint a committee, the procedure on the application to be the same as that in the *Patients Property Act*.

3. The Court

In part the powers that might be given to the court in relation to the termination of a power or the authority of the attorney have been discussed. But it is convenient to consider the powers of the court in one place. That may be done under three heads:

(a) *Patients Property Act*;

(b) Removal and Appointment of Attorneys;

(c) Applications.

(a) *Patients Property Act*

Section 1(a) and (b) of the *Patients Property* Act provides that a person may become a patient under the Act in one of two ways, by court order, or by virtue of a certificate signed by the director of a Provincial mental health facility or psychiatric unit (as defined in the *Mental Health Act* , R.S.B.C. 1996, c. 288).

On a person becoming a patient pursuant to court order, every power of attorney granted by the patient is terminated (s. 19 (a)). The court may appoint a committee for the patient; until then, the Public Guardian and Trustee is the committee (s. 13).

Why is an enduring power of attorney terminated when a donor is determined to be a patient by court order? The provision pre-dates the recognition of enduring powers of attorney; see *Patients' Estates Act*, S.B.C. 1962, s. 20. As the law then stood, it made sense to state that a declaration of incapacity by a court terminated a power. But the whole point of permitting the

creation of enduring powers of attorney was to enable donors to provide for the situation where they became incapable of managing their affairs. It seems strange for powers to be terminated when that event occurs.

B.C. Report (1975) (21- 23, Recommendation 14), while accepting that a declaration of incapacity should still terminate a power, recognized that the existence of enduring powers had changed things by recommending that an enduring attorney should be deemed to be a committee. This at least would ensure that the person selected by the donor would continue to act, but it would subject him or her to the *Patients Property Act*, something the donor may have been trying to avoid. Section 19 (1) (b) takes matters a step further with respect to representation agreements. It provides that an agreement terminates, unless the court orders otherwise. If such an order is made at least the agreement continues fully in force, but one may still ask why the reverse assumption should not be made - the agreement the adult put in place continues unless the court appoints a committee.

Such a change may not make too much difference in practice. Applications for a declaration of incapacity will usually be accompanied by an application for the appointment of a committee. But one would at least start that process on the assumption that the arrangements made by the donor should remain in place unless the court decided it was more appropriate to appoint a committee.

If a person becomes a patient on the basis of a certificate, every power of attorney granted by the patient is suspended (s. 19 (b)), and the Public Guardian and Trustee becomes the committee of the patient. If, on receiving a copy of the suspended power of attorney and any other information he or she deems necessary, the Public Guardian and Trustee decides it is necessary or desirable for the Public Guardian and Trustee to manage the patient's property, the power is terminated (s. 19 (3)). If the Public Guardian and Trustee decides it is not necessary or desirable that he or she manage the property, the power of attorney is revived (s. 19 (4)).

These provisions are subject to the same objections that have just been made in respect of declarations of incapacity by the court - an arrangement a donor put in place to deal with possible incapacity should *prima facie* be allowed to operate when incapacity occurs. Given the process for the issuing of certificates, it may be necessary to make the Public Guardian and

Trustee the committee to ensure that action can be taken immediately if needed. But once it is established that an enduring power of attorney is in place, the presumption should be that the power is then the operative document and the committeeship terminates. That would, however, be subject to the authority that the Public Guardian and Trustee currently has under s. 19.1(3). If he or she decides it is necessary or desirable that the Public Guardian and Trustee to manage the financial affairs of the donor, the enduring power of attorney is then terminated and the committeeship continues.

(b) Removal and Appointment of Attorneys

It would seem to be desirable that the court should have the authority to remove the attorney of an incapable donor. The courts have long exercised a similar jurisdiction in the case of trusts, having the power to remove trustees if the interests of the beneficiaries are at risk. An incapable donor would seem deserving of the same protection.

If the court is to have a power to remove, it must be decided how the financial affairs of the donor are then to be administered. That matter was dealt with in considering the consequences of an attorney ceasing to act. It was there concluded that the court should have the discretion of appointing a new attorney or appointing a committee. The court should have a similar discretion where it removes an attorney.

(c) Applications

Two issues arise here, who may apply and the co-ordination of applications.

Section 6 of the *Patients Property Act* provides that the Attorney General or any other person may apply for the appointment of a committee. As has been noted earlier, at first glance, that is a very open ended provision, but it has not caused difficulty and may be retained. There is therefore no need to change the law.

It would be desirable to avoid a multiplicity of applications. It could therefore be provided that if there is an enduring power of attorney and the donor is incapable, on an application to appoint a committee a court could remove the attorney and appoint a successor; and on an application to

remove an attorney and appoint a successor the court would have the power to appoint a committee.

RECOMMENDATION 22

The *Patients Property Act* should be amended to provide that:

(1) When a court makes an order under section 1(b) of the Act that a person is incapable of managing his or her affairs, the court may, on application:

(a) terminate an enduring power of attorney and appoint a committee;

(b) remove an attorney under an enduring power of attorney and appoint a successor.

(2) On an application to appoint a committee the court should have the power to remove an attorney and appoint a successor; and, on an application to remove an attorney and appoint a successor, the power to appoint a committee.

(3) If a person is declared to be incapable of managing his or her affairs in a certificate issued pursuant to section 1(a) of the Act, any enduring power of attorney that may be in existence is suspended and the Public Guardian and Trustee becomes the committee. If it is subsequently determined that a valid enduring power of attorney exists, the committeeship of the Public Guardian and Trustee terminates, unless the Public Guardian and Trustee determines that it is necessary or desirable that the committeeship continue. In that case, the enduring power of attorney is terminated.

H. PROTECTION OF ATTORNEYS AND THIRD PARTIES

Attorneys should of course be expected to carry out the obligations which are imposed upon them, and third parties with whom they deal should not in general be able to rely on acts that are outside agents' authority. Nonetheless, neither group should unfairly be exposed to liability. That

is undesirable in itself. It may also operate to the disadvantage of donors, for, if they fear unfair treatment, people may become unwilling to act as attorneys, and third parties may be unwilling to deal with attorneys, or they may take precautions that make transactions expensive and time-consuming.

Both the *Representation Agreement Act* (s. 24) and the *Power of Attorney Act* (ss. 3, 4) provide some protection to agents and third parties with respect to what may be described as defects in the instruments. The *Power of Attorney* provisions apply to all types of agents, including attorneys (see the definition of "Agent" in section 1), but not to representatives (section 10). In general terms, each Act, in the circumstances covered in it, protects agents and third parties who act without knowledge of a defect when, but for the defect, they would have had authority to act and they acted within that authority. There are differences between them as to the type of defect covered, and, if not always in substance, at least in form, as to the pre-conditions which must be met before the protection will become operative. Moreover, neither statute draws a distinction between a third party who gives value in a transaction with an agent, and a third party who does not.

In principle, on this matter the same considerations apply to all agents and to representatives. The discussion that follows covers both groups. The recommendation that is made here will, following the present *Power of Attorney Act*, apply to all agents. A later parallel recommendation will be made with respect to representatives.

1. Types of defect

Section 24 of the *Representation Agreement Act* protects representatives and third parties when an agreement is invalid or not in effect. An agreement becomes effective on execution, or, if it provides it is to become effective on a later event, when that event occurs (s. 15). Invalidity clearly refers to the agreement being invalidly executed, but not, arguably, to invalidity arising from a lack of capacity of the adult. The Act does not deal with the situation where the agreement has been varied or revoked or has otherwise terminated.

Sections 3 and 4 of the *Power of Attorney Act* deal with the protection of agents and third parties. They apply only when an attorney's authority has been "terminated". Thus, they do not cover

invalidity (of any kind), an agency not being in effect or the suspension of an agency. "Terminated" is defined in section 1. It "... means that the authority has been terminated by revocation, or by operation of law, or by both." It is not clear if that covers a variation of the power.

There seems to be no good reason for this variation in the type of defect covered by the two Acts. Representatives and agents, and third parties who deal with them, are in the same position with respect to the degree of protection they deserve. Both Acts should cover defects arising from the instrument being invalid or not in effect, or having been suspended, varied or terminated.

So far as invalidity is concerned, there seems to be no reason why it should be confined, as it is in the *Representation Agreement Act*, to invalidity arising from improper execution. The English Act (section 9) and the Alberta Act (section 14) both cover invalidity arising from incapacity, though the Alberta Act might be better drafted. It is clear, however, the intent was to cover the case where the instrument was void *ab initio* because of the donor's incapacity. The Alberta Discussion Report did not deal with this issue, but the Alberta Report expressly stated it should be covered. It said (8):

> "We agree that, unless the protection is extended [to cover invalidity because of the donor's incapacity], the ability (and willingness) of people to rely on ...[enduring powers of attorney] may be significantly reduced, which will in turn reduce ... [their] practical utility ...."

Both Acts should therefore cover the invalidity of the instrument, whether arising from the incapacity of the donor or improper execution of the instrument, and from the variation, suspension or termination, by operation of law or otherwise, of the authority.

2. Pre-conditions

The general principle underlying the provisions of both Acts is that agents or third parties will be protected if they did not know of the defect in the instrument, and if the agent is acting within the authority he or she would have had, had the defect not existed. There are however differences, in some cases perhaps only of form, in others of substance, in the ways in which the Acts implement the principle. The provisions in the *Power Of Attorney Act* are based on

recommendations of the British Columbia Law Reform Commission, *The Law of Agency, Part 1: The Termination of Agencies* (1975), 18-29.

(a) Agents

Section 24 (1) of the *Representation Agreement Act* and section 3 of the *Power Of Attorney Act* both provide that if an agent does not know of the defects presently covered in each Act, the agent is "deemed" to have authority to act. This protects the agent against claims by the principal or third parties.

To have full knowledge of the status of an instrument requires knowledge of some facts and of their legal consequences. In relation to both matters, knowledge may be actual, or some form of imputed knowledge.

So far as knowledge is concerned, section 24 (1) applies if the representative "does not know, and could not reasonably have known" of the invalidity or the agreement not being in effect. Section 3 applies if the agent no "knowledge" of the termination. Knowledge "includes knowledge of circumstances that would put a reasonable person on inquiry" (section 1). Both these formulations may be saying substantially the same thing, but section 3 may state the position more clearly.

Whatever be the formula for deciding what is knowledge, section 24 requires that the representative know that the agreement is invalid or not in effect. That involves both fact and law. Section 2 (2) of the *Power of Attorney Act* provides that if a person knows of an event that at law terminates a power, then he or she is deemed to know of the termination. In effect, it suffices if the person has actual or imputed knowledge of the event, not of its legal consequences.

Suppose a donor becomes bankrupt in a jurisdiction where that terminates the power of attorney. An attorney knows of the bankruptcy. Under section 24 language, to be fixed with knowledge of the termination, the attorney would actually have to know the law, or it would have to be decided whether he or she was reasonably put on inquiry as to the legal consequences of the bankruptcy.

Under the *Power of Attorney Act* it suffices that the attorney knows of the bankruptcy. Section 2 (2) automatically fixes him or her with knowledge of the legal consequences.

In many, probably the vast majority of cases, the result will be the same no matter how the law is stated. If a person is not deemed to know the law, it will often be found that the events that happened would have put a reasonable person on inquiry as to what the law was. But a choice should be made between the two possible rules. It may seem fairer to attorneys not to automatically deem them to know the law. However, people are often fixed with the legal consequences of events when they did not know what those consequences were. Moreover, the events that are in question - things like the incapacity of a principal, the bankruptcy of a principal or agent - will be such as to put a reasonable person on inquiry as to the legal consequences.

Section 24 expressly states that the representative "is not liable for acting without authority." That probably flows from the provision, common to sections 24 and 3, that the agent is "deemed" to have the authority to act, and therefore is not strictly needed. If one wanted to give as much protection as possible to the agent it might be better to provide that the agent is "conclusively" deemed to have authority. "Deemed" by itself probably creates only a rebuttable presumption. Presumably the intent is give absolute protection to the agent if the pre-condition of lack of knowledge is satisfied.

(b) Third parties

Section 24 (2) of the *Representation Agreement Act* and section 4 of the *Power Of Attorney Act* deal with the position of third parties. In substance, *mutatis mutandis*, they say substantially the same thing. If there is a defect in the instrument of the type covered by the section, but a third party does not know of the defect, any transaction between the agent and the third party is deemed, in favour of the third party, to be as valid as if the authority existed or had not been terminated (sections 24 (2), 4 (1)). "Knowledge" in section 4 of the *Power Of Attorney Act* is defined in the same way as in section 3 of that Act. Section 24 (2) of the *Representation Agreement Act* applies when a third party "did not know and no reason to believe" that the defect in authority existed. This is different language from that used in section 24 (1).

There seems to be no reason why there should be different formulations of the nature of the knowledge required in the case of a representative or a third party. Thus, the suggestion that was made as to how knowledge should be dealt with in the case of an agent should also apply to third parties.

Section 4 (2) and (3) of the *Power Of Attorney Act* contain provisions that do not appear in section 24 of the *Representation Agreement Act*. Under section 4 (2), if a donor has expressly terminated the authority of the agent and gives notice of the termination to the agent, the liability of the principal is to be determined on common law principles. The third party will presumably have to rely on the doctrine of apparent or ostensible authority. The rationale for section 4 (2) is to be found at pages 21-22 of the Law Reform Commission Report (supra, p. 89). The Commission pointed out that under section 4 (1) a principal might notify the agent of an express revocation, take the precaution of also notifying all the persons with whom the agent customarily dealt, and still be liable to a "new" third party with whom the agent purported to do business for the first time and who had no knowledge of the termination. The Commission thought it would be unfair to automatically hold the principal to a bargain with a third party in those circumstances.

Section 4 (3) of the *Power Of Attorney Act* deals with the position of someone whom the section calls the "stranger": section 24 (2) of the *Representation Agreement Act* may not do so. Section 4 (3) is somewhat complex. Whether it is needed, or whether the more general language of section 24 (2) deals with the situation, can best be considered by looking at a specific example.

Suppose P gives a power of attorney to A, and later revokes it. A, purporting to act under the power, enters into a transaction with X, A not knowing but X knowing of the revocation. Given that X knows of the revocation, the agreement is not binding on P. X in turn enters into a transaction with Y, the validity of that transaction being dependent on the validity of that transaction between X and P.

Section 24 (2) of the *Representation Agreement Act*, by its terms, is confined to transactions between the representative (A) and a third party (X). If those transactions are not protected by the sub-section, it follows, so it will be argued, that the dependent transaction between X and Y must also fall, whatever Y's knowledge. Sub-section 4(3) protects Y. It provides that if a

"stranger" (Y) had, at the material time, no knowledge of the termination of authority, and Y's rights are dependent on the validity of the transaction between the third party (X) and the agent (A), the third party (X) is conclusively deemed to have no knowledge of the termination.

(c) Gratuitous transfers

The provisions in both Acts, it would seem, are based on the (reasonable) assumption that the transactions in which the agent will be engaging will be transactions under which the third party will be providing value. However, at the moment a representative authorized to make decisions on routine management may make charitable donations (B.C. Reg. 199/2001, s. 2 (1) (v); but see Recommendation 27(3)). It has also recommended that attorneys be empowered to make gratuitous provision for some third parties (see Recommendation 12). In any event, either instrument could expressly authorize the agent to make gifts.

A representative or an agent who makes a gratuitous transfer should be entitled to protection if the conditions set out above are met. However, the transferee arguably should not be in the same position as a person who gave value. As a matter of the modern law of restitution, if a transferor makes a mistaken transfer, whether the mistake be one of law or fact, the transferor is entitled to restitution, subject to any defences which may be available to the transferee. There would seem to be no reason in principle why the same rules should not apply if the mistake is one as to the authority of an agent. If an agent makes a gratuitous disposition beyond his or her authority, the donor should be entitled to restitution from the transferee, subject to any defences which would normally be available to a mistaken transferee.

RECOMMENDATION 23

Sections 3 and 4 of the Act should be amended so that:

(1) they cover (in addition to termination) the situation where a power is, in whole or in part: (i) initially invalid, by reason of incapacity, improper execution, or otherwise; (ii) varied; (iii) suspended;

(2) so far as gratuitous transfers by an agent is concerned, the donor of a power of attorney be entitled to restitution from the transferee, subject to any defences that

would normally be available to a transferee to whom a transfer has been made by mistake.

I. APPLICATIONS TO COURT

1. Applications for directions

The Saskatchewan Consultation Paper suggests that it is likely that an attorney may apply to court for directions at common law. It is not clear if that is the case.

It may be possible to bring an application under Rule 10 of the Supreme Court Rules. Rule 10 provides for the bringing of applications by originating application in any of the circumstances listed in Rule 10 (1) (a) – (h). Either one of paragraphs (b) and (e) might apply:

> "(b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document;
>
> (e) the relief, advice or direction sought relates the maintenance, guardianship or property of infants *or other persons under disability*;" (Emphasis added)

The Rule however may be subject to one significant limitation. *Hall Estate* v. *Anderson Estate* (1996), 12 E.T.R. (2d) 275 (B.C.S.C.), dealt with an application under paragraph (d), which applies where "the relief, advice or direction sought relates to a question arising in the administration of an estate of a deceased person……". The court held that the paragraph authorized the bringing of an application, but not the granting of relief. The power to grant relief had to be found in common law or statute. There is some doubt about the decision.

Even if it is possible that an application may be made at common law or under the Rule, it would be wise, if only out of an abundance of caution, to have a specific statutory provision. Such a provision exists in Alberta, Manitoba and Ontario; see the Alberta (s. 9), Manitoba (s. 24 (1) (a)) and Ontario (s. 39) Acts. The Saskatchewan Consultation Paper (Recommendation 34) recommends the adoption of the Alberta legislation. An obvious precedent for applications of this nature may be found in sections 86 and 87 of the *Trustee Act*, R.S.B.C. 1996, c. 464, sections which have their counterparts in most provincial Trustee Acts.

In drafting any legislation, two questions need to be dealt with, who may apply and what is to be the nature of the court's jurisdiction.

Under the Alberta Act, only the attorney may apply. That parallels the provisions in the *Trustee Act*. In Manitoba applications may be brought by an attorney, the Public Guardian and Trustee, the nearest relative of the donor (as defined in the Act), a person entitled to an accounting under the Act and, with the leave of the court, any interested person; see the Manitoba Act, s. 24 (2). In Ontario applications may be brought by an attorney, a dependant of the donor, a person entrusted with making decisions on the personal care of the donor, the Public Guardian and Trustee and any other person with the leave of the court; see the Ontario Act, s.39 (2).

There is some advantage in persons other than the attorney being able to apply, but it would be better if the list were not too long, for one would not want to encourage a flow of applications. Where the attorney and the person entrusted with the personal care of the donor are different persons it makes sense to allow the latter to apply. As the law now stands, the Public Guardian and Trustee may investigate the conduct of an attorney; on occasion it may be useful for the Public Guardian and Trustee to follow up an investigation with an application. Beyond that, the simplest thing to do is to confer on the court the discretion to permit applications by other people. The discretion the court has in relation to costs is a sufficient safeguard against the possibility of frivolous applications.

The nature of the court's jurisdiction will depend on whether one adopts language like that in section 86 of the *Trustee Act*, or language comparable to that of section 39 (4) of the Ontario Act. In the first case, in very general terms, if the courts follow the pattern of decision under the *Trustee Act*, they will give directions on the nature and scope of the attorney's authority, but, except in exceptional cases, will not make discretionary decisions for the attorney. The intent of the Ontario Act seems to be to confer a jurisdiction to make decisions. It is suggested that the former approach is to be preferred. As with trustees, attorneys under continuing powers are appointed with the expectation that they will make discretionary decisions, difficult though that may sometimes be. Resort to the court should be the exception rather than the rule.

RECOMMENDATION 24

> The Act be amended to provide that in the case of enduring powers of attorney, an attorney, a person entrusted with the personal care of the donor, the Public Guardian and Trustee and, with the leave of the court, any other person may apply to court for advice and directions, the provisions to be modelled on those in sections 86 and 87 of the *Trustee Act*.

2. Relief from liability

The Ontario (s. 33 (1) and Newfoundland (s. 6 (1)) Acts confer on the courts the power to relieve an attorney from liability if certain conditions are met. There is also a precedent for this type of jurisdiction with respect to trustees; in British Columbia, see the *Trustee Act*, R.S.B.C. 1996, c. 464, s. 96.

If such a jurisdiction is to be conferred on the court, there is much to be said for modelling it on section 96. There is a fair amount of case-law under that section and the corresponding sections in other jurisdictions, and that will provide some guidance to the courts. In particular the courts, while not unsympathetic to trustees, have been fairly cautious in the exercise of the jurisdiction, particularly in the case of "professional" trustees. There is therefore little risk that interests of the donor will be adversely affected.

RECOMMENDATION 25

> The Act be amended to confer on the courts a jurisdiction to relieve an attorney under an enduring power of attorney from liability similar to the jurisdiction in section 96 of the *Trustee Act* to relieve a trustee from liability.

V. CONSEQUENTIAL CHANGES

A. INTRODUCTION

If the recommendations made so far are implemented it then becomes necessary, or in some cases, if not necessary, at least desirable, to make some consequential changes. These can be considered under five heads:

(1) The *Representation Agreement Act*;

(2) Two instruments;

(3) Transition – enduring powers of attorney;

(4) Transition – representation agreements;

(5) Implementation period.

B. REPRESENTATION AGREEMENT ACT

This Review was concerned primarily with the arrangements that may be made for dealing with financial affairs. No attempt has been made to give comprehensive consideration to the *Representation Agreement Act* so far as it deals with personal affairs. With respect to those matters, the philosophy and the structure of the Act have been taken as given.

1. Execution of Representation Agreements

If there are to be two instruments, one for financial and one for personal matters, it is not absolutely necessary that they have the same or similar rules for their execution. However, in very general terms, the instruments perform the same function – they enable their makers to make arrangements for the making of decisions should they become incapable. There should not be two totally disparate sets of rules, unless there is good reason for it.

On two grounds, a persuasive case may be made that the requirements for the execution of representation agreements should be the same, as far as possible, as those for enduring powers of attorney.

First, what was said in chapters II and III about the execution of enduring powers of attorney applies with equal force to the execution of representation agreements. Indeed, so far as those agreements deal with personal matters, the case may be stronger for simpler execution procedures. There will generally not be the same opportunity for the representative who is charged with taking care of an adult's personal affairs to take personal advantage of the situation as there is for the representative managing financial affairs.

Second, in other provinces the execution requirements for instruments dealing with personal matters are the same as those for enduring powers, or simpler. Alberta (*Personal Directives Act*, R.S.A. 2000, c. P-6, s.5) and Ontario (Ontario Act, s. 48) have the same provisions as to witnesses for instruments dealing with personal matters as they have for instruments dealing with financial affairs. Newfoundland requires two witnesses (*Advance Health Care Directives Act*, S.N. 1995, c. A-4.1, s. 6), Nova Scotia one (*An Act Respecting Consent to Medical Treatment*, R.S.N.S. 1979, c. 279, s. 3 (2)), and Manitoba and Prince Edward Island none, unless someone signs for the maker, in which case someone other than the surrogate signatory must sign as a witness (*The Health Care Directives Act*, C.C.S.M., c. H27, s.8; *Consent Treatment and Health Care Directives Act*, R.S.P.E.I. 1988, c. C-17.2, s. 21).

It is therefore recommended that in general the process for the execution of enduring powers of attorney should apply to representation agreements. However, two additional matters arise, signing by the representative, and the execution of section 7 agreements.

A representation agreement is, on the face of the Act, an agreement. (In some respects it may be a rather one-sided agreement. For example, a capable adult may amend the agreement without, it would seem, any need for the consent of the representative (see s. 27 (1)). The parties to the agreement are the adult and, presumably, though the Act does not expressly say so, the representative or representatives. Under the Act as it now stands, representatives must sign the agreement, but the signature does not need to be witnessed (s. 13 (2), (3.03)). If the arrangement is intended to operate by way of agreement it does makes sense for the representative to sign the

agreement. Equally, it does not seem necessary for anyone to witness the signature of the representative. In so far as the manner of execution may operate as a safeguard for the adult, there is no need to provide similar safeguards for representatives.

Second, it might be thought that greater formalities should be required in the case of a section 7 agreement. The maker may to some degree be incapacitated, and so some greater formality may be justified. (As the Act now stands greater formality is required in the case of section 9 agreement, where the maker must be fully capable.) A person making a section 7 agreement may however be adequately protected by the provisions on the appointment of monitors.

The general rule is that a monitor must be appointed if a representative is authorized to make decisions, or assist in the making of decisions, on routine management (s. 12 (1)). The appointment of a monitor, who is obliged to make reasonable efforts to determine if the representative is carrying his or her duties (s. 20 (1)), affords as good, if not better, protection to the adult than does more complex execution requirements. It would, however, be desirable to have the monitor sign the agreement so that third parties know of the monitor's existence

By way of exception to the general rule a monitor need not be appointed if (s.12 (1):

(1) the representative is the adult's spouse, the Public Guardian and Trustee, a trust company or a credit union;

(2) there are two or more representatives who are required to act unanimously;

(3) the adult consults a lawyer or other specified person, and that person completes a certificate.

If the suggestions made above are adopted the process of consultation will be eliminated, and so the third exception will disappear. The first two will remain. Presumably the rationale for not requiring a monitor in those two cases is that the nature of the representatives assures the adult of some protection. Again that is as good, if not better, protection than complex execution requirements.

If this recommendation is adopted, the basic requirements for the execution of representation agreements would be that they must be:

(1) in writing;

(2) signed by the adult in the presence of one witness;

(3) signed by the witness in the presence of the adult;

(4) signed by the representative(s), whose signature(s) need not be witnessed;

(5) signed by the monitor, if a monitor is appointed.

On that basis, the provisions in the Act on the preparation of certificates by witnesses, representatives, monitors and anyone signing for the adult would be deleted. So also would the requirement for consultation with a lawyer or other prescribed person (and it would, of course follow the requirement of a certificate of consultation).

On the other hand, the following provisions of the Act would remain: Section 13(3.1) - *The Land Title Act*; section 12(4), except for paragraph (d) - signing by another person on behalf of the adult; section 13 (5), (5.1) - prohibited witnesses; section 13(7) - the courts' remedial powers.

Two comments may be made about these provisions:

(1) Section 13 (3.1) relates to the formalities needed for the purposes of the *Land Title Act*. Under the proposals made here, for the future representation agreements will no longer deal with land. It may however be needed to keep the provision to accommodate existing representation agreements. (See Recommendation 40).

(2) No change is suggested with respect to prohibited witnesses. It may be that they should be the same as the prohibited witnesses in the case of enduring powers of attorney. However, there may be considerations that are particularly applicable in the case of agreements on personal affairs, and it is better to leave the prohibitions as they are.

On this basis, there would not be total similarity in the recommended requirements for the execution of enduring powers of attorney and representation agreements, but they would be much closer than they are now, and the execution of representation agreements would be a simpler process.

RECOMMENDATION 26

(1) Section 13 of the *Representation Agreement Act* be amended to provide that a representation agreement is validly executed if it is:

(a) in writing;

(b) signed by the adult in the presence of one witness;

(c) signed by the witness in the presence of the adult;

(d) signed by the representative or representatives, who need not sign in the presence of any other person and whose signature need not be witnessed;

(e) signed by the monitor, if a monitor is appointed.

(2) The provisions on the preparation of certificates by witnesses, representatives, monitors, the requirement for consultation with a lawyer or other prescribed person be deleted from the Act.

(3) In amending Section 13, the following sub-sections be retained: (3.1), (4), except for paragraph (d); (5); (5.1); (7).

2. Terms of Representation Agreements

If Recommendation 1 is accepted, then the *Representation Agreement Act* will need to be amended to delete from it all references to financial affairs, except for references needed because of section 7. That will require amendments to sections 7 and 9 in particular.

(a) Section 7

It has been recommended that section 7 not be altered. Thus, a representative could still be authorized to act for an adult on all the matters presently listed in the section. Two changes should be made and one change considered.

First, the reference to legal matters in section 7 (1) (d) should be confined to matters otherwise falling within a section 7 representation agreement, or, where appropriate, within a section 9 agreement.

Second, section 2 (1) (v) of B.C. Reg. 199/2001 authorizes a representative who is empowered to handle the routine management of the adult's financial affairs to make gifts to charity. The assumption behind Recommendation 13 is that the legislation should not authorize the making of gifts. If that is a valid assumption, then section 2 (1) (v) should be repealed.

Third, the side note to Section presently reads "**Standard Provisions**". This does not affect the interpretation of the section. It is, however, somewhat misleading. It might be better to use the phrase "**Limited Agreements**". This better describes the agreements contemplated by the section.

(b) Section 9

Paragraphs (f) and (g) of sub-section (1) need to be deleted. Beyond that the following changes should be considered.

It might be desirable if one could dispense in section 9 with the list of specific items, and cover "personal" affairs under a general description. One possible model is to be found in the definition of "personal matter" in the *Personal Directives Act*, R.S.A. 2000, c. P-6, s.1 (l):

> " 'personal matter' means, subject to the regulations, any matter that is of a non-financial nature that relates to the individual's person and without limitation includes:
>
> (i) health care;

(ii) accommodation;

(iii) with whom the person may live and associate;

(iv) participation in social, educational and employment activities;

(v) legal matters;

(vi) any other matter prescribed by the regulation."

The apparent simplicity of the definition is complicated by the fact that the definition is "subject to the regulation". Moreover, if it were adopted, it would be wise to confine "legal matters" to matters that otherwise fell within the definition of personal care (as has been suggested should be done in section 7 of the *Representation Agreement Act*), and to exclude divorce proceedings.

Consideration might also be given to changing the side note. It reads "**Other provisions**". The section enables a person to confer wider authority than can be done under section 7. The side note might therefore read "**General Agreements**".

(c) Consequential changes

Sections 2 and 3 will need to be changed so that references to financial matters are to those financial matters that may be dealt with in section 7 agreements.

RECOMMENDATION 27

(1) The *Representation Agreement Act* be amended to remove from it all references to financial matters, except for those references that need to be retained because of section 7.

(2) The reference to legal matters in section 7 should be confined to matters referred to in section 7 and section 9.

(3) Section 2 (1) (v) of B.C. Reg. 199/2001 should be deleted.

(4) Paragraphs (f) and (g) should be deleted from section 9.

(5) Sections 2 and 3 should be changed so that it is clear that the references to financial affairs are to matters falling within section 7.

SUGGESTION

(1) The side-note to section 7 should read "**Limited Agreements**".

(2) Consideration should be given to re-drafting section 9 (1) in the same manner as the definition of "personal matter" in section 1 (1) of the *Personal Directives Act*, R.S.A. 2000, c. P-6.

(3) The side-note to section 9 should read "**General Agreements**".

3. Duties

Only one recommendation is made on amending the *Representation Agreement Act* with respect to the duties of a representative.

One of the criticisms of the Act is that it does not make it clear when the duties of a representative arise. The representative takes office pursuant to agreement. It may be that, in the absence of any contrary provision in the agreement, the duties of the representative arise at the date of the agreement. However, as in the case of an enduring power of attorney, this often may not be what the parties have in mind. They expect the representative to act only when the adult is incapable or, perhaps may be incapable, of acting. That would not prevent the representative acting before incapacity, with the consent of the adult.

RECOMMENDATION 28

The *Representation Agreement Act* be amended to provide that, subject to a contrary intention in the agreement, a representative comes under a duty to act only if the representative has reasonable grounds to believe that the adult is incapable of making decisions.

4. Enforcement of duties

(a) The Public Guardian and Trustee - investigations

As the law now stands, there are three statutory provisions dealing with the Public Guardian and Trustee's powers of investigation in relation to representation agreements:

(1) Under sections 30 and 31 of the *Representation Agreement Act*, the Public Guardian and Trustee may, on receiving an objection (s.30) or of his or her own volition (s.31), conduct an investigation if there is reason to believe that an agreement was invalidly created, varied or revoked, or that a representative is in breach of his or her duties. These matters will be referred to collectively as "improprieties". The actions that may be taken are set out in section 30 (3);

(2) Under section 17 (1) of the *Public Guardian and Trustee Act*, the Public and Guardian and Trustee may "investigate and audit the affairs, dealings and accounts" of a representative where there is reason to believe that a representative has failed to comply with his or her duties. The Act does not say what the Public Guardian and Trustee may do if the investigation discloses breaches of duty ;

(3) Under section 17 (2) *Public Guardian and Trustee Act*, the Public and Guardian and Trustee may investigate decisions made on personal matters by a representative if there is reason to believe that a representative has failed to comply with his or her duties. Again the Act does not say what the Public Guardian and Trustee may do if the investigation discloses breaches of duty.

There are obvious overlaps and inconsistencies between these provisions. Under sections 30 and 31 it would seem that investigations may be conducted into breaches of duty in relation to both personal and financial matters. Section 17 (1) confers a power of investigation into financial matters, section 17 (2) into personal matters. It would be simpler to have one source of the provisions on investigation, either the *Representation Agreement Act* or the *Public Guardian and Trustee Act*. As a matter of convenience, it would be useful if the Act that did not contain the provisions had a cross-reference to the Act that did.

If that were done, five changes might be considered. In some respects these would align the powers of investigation in relation to representation agreements with those suggested for enduring powers of attorney.

First, it would appear that section 30 covers breaches of duty that have occurred (s.30 (1) (e)) or may be occurring (s. 30 (1) (h)). It does not permit action to be taken if there is a reason to be believe a breach may be about to happen. If it would be useful if it was clear the Public Guardian and Trustee had a power which might prevent a breach.

Second, the sequence of events under sections 30 and 31 might be made clearer. Section 30 (1) provides that an objection may be made if there *is* reason to believe that there is an impropriety. That could be read as suggesting that there has to be *valid* reason to believe before an objection may be made. Often of course the Public Guardian and Trustee, after reviewing the objection, will decide there is no reason to believe there is anything wrong. It may be more in keeping with the intent of the Act simply to say that any person may make an objection alleging there is an impropriety, and leave the decision on whether there is reason to believe there is any impropriety to the Public Trustee.

Third, section 30 (3) now provides that the Public Guardian and Trustee must review an objection. However, both under section 30 (1) and section 31 (where the Public Guardian and Trustee acts of his or her own volition) it seems there is no obligation to take further action, even if it is concluded that there is reason to believe that there is an impropriety of the type covered by the sections. That seems odd. However, for the reasons suggested in relation to powers of attorney, an investigation should not be mandatory, but the Public Guardian and Trustee should be empowered to take such action as he or she in his or her discretion deems expedient, including the undertaking of any investigation.

Fourth, it would seem that under both Acts the Public Guardian and Trustee may act even if the representative is capable. Section 17 (1) (b) of the *Public Guardian and Trustee Act* makes it clear that in the case of an attorney an investigation may take place only if the Public Guardian and Trustee has reason to believe the donor is incapable. There is no similar limitation in section 17 (1) (c) with respect to representatives.

There seems no reason to involve the Public Guardian and Trustee if the adult is capable. A capable adult may take whatever steps he or she deems necessary. It should therefore be provided that the Public Guardian and Trustee may conduct an investigation only if he or she has reason to believe that the adult is or may be incapable.

Fifth, section 18 of the *Public Guardian and Trustee Act* gives the Public Guardian and Trustee quite extensive powers in conducting an investigation. Those powers are expressly incorporated into section 30 of the *Representation Agreement Act*, but it is not totally clear they are incorporated into section 31. It should be made clear that they are.

RECOMMENDATION 29

(1) All of the powers of investigation of the Public Guardian and Trustee with respect to representation agreements should be consolidated either in the *Public Guardian and Trustee Act* or in the *Representation Agreement Act*. The Act which does not contain the powers should contain a cross-reference to the Act that does.

(2) The legislation should provide that a person may make an objection to the Public Guardian and Trustee alleging any of the matters currently set out in section 30(1) of the *Representation Agreement Act*.

(3) The legislation should provide that objections may not only allege that a breach of duty has occurred or is occurring, but that a breach of duty is about to take place.

(4) The legislation should provide that if the Public Guardian and Trustee has reason to believe that an adult is or may be incapable and that an impropriety of the nature currently listed in section 30 of the *Representation Agreement Act* exists, the Public Guardian and Trustee may take such action as he or she in his or her discretion sees fit, including the carrying out of a formal investigation.

(5) It should be made clear that the powers available under sections 18 and 19 of the *Public Guardian and Trustee* are available to the Public Guardian and Trustee in conducting an investigation with respect to a representation agreement.

(c) Complaints

It was recommended (Recommendation 18) with respect to enduring powers of attorney that:

(1) A person who in good faith makes a complaint to the Public Guardian and Trustee should not, by virtue solely of lodging the complaint, be subject to any liability;

(2) A person who in good faith lodges a complaint with the Public Guardian and Trustee should not be subject to liability for disclosing confidential information if the lodging of the complaint required the disclosure of the information.

The reasons for those recommendations apply equally to persons making a complaint under section 30 of the *Representation Agreement Act*.

RECOMMENDATION 30

The *Representation Agreement Act* should be amended so that it provides to persons making objections to the Public Guardian and Trustee the same protection as is recommended in Recommendation 18 for those who lodge complaints in the case of enduring powers of attorney.

5. Termination

Recommendation 22 dealt with the effect of enduring powers of attorney of a person becoming a patient under the *Patients Property Act*. It recommended that if a person became a patient under a court order, an enduring power of attorney should continue in existence unless the court decided to appoint a committee. If a person became a patient because a certificate was issued under section 1(a) of the Act, it was recommended that the Public Guardian and Trustee become the committee of the patient and any enduring power of attorney that might exist should be suspended. However, if it is established that there is a valid power, that power should be revived, unless the Public Guardian and Trustee decides that it is necessary or desirable that he or she continue to act as a committee; in which case the power should be terminated.

If this recommendation is implemented, similar provisions should be made with respect to the representation agreements.

RECOMMENDATION 31

> The *Patients Property Act* should be amended to make similar provisions for representation agreements as are recommended for enduring powers of attorney in Recommendation 22.

6. Protection of representatives and third parties

With respect to financial affairs, the reasons for the Recommendation 23, dealing with the protection of attorneys and third parties, apply equally to representatives and third parties. Even if the recommendations made here are adopted the *Representation Agreement* Act will still be applicable two types of agreements dealing with financial affairs: any agreement made before any amending legislation comes into force (see below Recommendation 40), and any agreement made under section 7(1)(b). Representatives who may be responsible for those financial matters, and those dealing with them, should have the same protections as apply in the case of other agencies.

The language that may be used to deal with financial affairs may not always be appropriate to deal with personal matters. Section 24 of the *Representation Agreement Act* should be retained, but the following amendments made to it:

(1) the section should apply to non-financial matters;

(2) the section should be amended so that it applies not only when an agreement is not in effect or is invalid, but when an agreement has been varied or terminated; and it should be made clear that that invalidity covers invalidity for any reason and not simply for improper execution.

(3) knowledge of the representative and the third party should be defined as is recommended in Recommendation 23.

RECOMMENDATION 32

(1) A new section should be added to the *Representation Agreement Act* dealing with the position of representatives and third parties in relation to financial matters when an agreement is invalid, is not in effect, or has been varied, suspended or terminated. The section should modelled on the recommendations made in Recommendation 23.

(2) Section 24 of the *Representation Agreement Act* should be amended so that:

(a) the section applies only to non-financial matters;

(b) the section applies not only when an agreement is not in effect or is invalid, but when an agreement has been varied, suspended or terminated; and it should be made clear that invalidity covers invalidity for any reason and not simply for improper execution;

(c) knowledge of the representative and the third party should be defined as recommended in Recommendation 23.

7. Applications to Court

(a) Applications for directions

Under section 34 (2) of the *Representation Agreement Act*, a court, on an application by a representative, may give directions or an opinion on the interpretation of an agreement. Two changes to this provision are worth considering. Both are modelled on Recommendation 24, which recommended, in general terms, that in the case of enduring powers of attorney applications could be made to court in accordance with provisions similar to those found in sections 86 and 87 of the *Trustee Act*, R.S.B.C. 1996, c. 464.

First, under section 34 (2) it appears the court can give directions to the representative as to how to act. As was pointed out on page 95, under the provisions in the *Trustee Act*, the court will give

directions on the scope and nature of a trustee's authority, but will not, except in exceptional circumstances, tell trustees how to exercise any discretionary authority they may have. It was suggested the latter approach was appropriate in the case of attorneys; they and not the courts are appointed to make those types of decision. This, it is suggested, is also the case with respect to representatives.

Second, section 86 of the *Trustee Act* provides that a trustee who acts on the basis of an order is deemed to have discharged his or her duties. This is subject to the qualification that the trustee must not have been guilty of any fraud, wilful concealment or misrepresentation in making the application. It would seem appropriate to afford similar protections to a representative acting pursuant to court order.

RECOMMENDATION 33

> Section 34 (2) of the *Representation Agreement Act* be repealed and replaced by provisions applying to applications made by representatives modelled on sections 86 and 87 of the *Trustee Act*.

(b) Relief from liability

It was suggested in Recommendation 25 that courts should have the same powers to relieve attorneys under enduring powers of attorney from liability as they have to relieve trustees from liability under section 96 of the *Trustee Act*. If there are valid reason for that recommendation, it should also apply to representatives.

RECOMMENDATION 34

> A section should be added to the *Representation Agreement Act* conferring on the courts a jurisdiction to relieve a representative from liability similar to the jurisdiction under section 96 of the *Trustee Act* to relieve a trustee from liability.

C. TWO OR MORE INSTRUMENTS

Under the proposals made here, there are two sets of circumstances in which the existence of two or more instruments could cause difficulty. A principal may draw up a section 7 agreement dealing with financial affairs and an enduring power of attorney, conferring, in whole or in part, overlapping financial authority on different people. It is also possible for authority on financial matters to be conferred on one person and on personal matters on another.

1. Instruments conferring the same authority

The possibility of instruments conferring overlapping authority is not new. For example, two powers of attorney could, in whole or in part, have conferred the same authority on two different people.

If documents conferring overlapping authority are properly drafted, the documents themselves should state what is the relationship between them. One would hope therefore to find a clause, normally though not inevitably in the second document, expressly dealing with the overlap. If that is not done, in theory there is a problem. In fact, there is no evidence to suggest that overlapping powers have been common, or that, so far as they may have been created, they have caused difficulty. It is probably fair to assume that will continue to be the case. There may therefore be something to be said for leaving the issues that may arise to judicial resolution.

However, as representation agreements and enduring powers are both creatures of statutes, it may be thought the legislation should at least give an indication of a *prima facie* position. That position may be determined by two considerations, what intention should be attributed in the first instance to a person who has given overlapping authority, and what are the consequences for agents and third parties of attributing to the principal a particular intention.

Overlapping instruments may be created in two sets of circumstances. A principal may create an instrument, fully appreciating it overlaps with an earlier instrument, and yet not deal with the overlap. The intent might be that the second replaces the first, or that the two documents should stand side by side. Overlapping instruments may also come into existence because the principal has forgotten about the earlier instrument(s), or does not appreciate that there is an overlap. In

that case it may be that the intent is the second prevails to the extent of the overlap, and to that extent the first is revoked; but that would not necessarily be the case in all circumstances.

In this state of uncertainty, it is very much a guess as to what the intention might have been. It may be therefore that in the first instance the situation should be taken at its face value. The principal has created two documents. Effect should be given to both documents, subject to there being, either expressly or by necessary implication from all the circumstances, a clear contrary intention.

This approach also has the advantage that agents and third parties who know of only one document can act safely on the basis of that document. If they know of two, they still can act safely, unless there is an express provision or a necessary implication that curtails the authority of the agent. Any risk that may still exist will be lessened if the general recommendations made on agents and third parties are adopted.

RECOMMENDATION 35

> The *Representation Agreement Act* and the *Power of Attorney Act* be amended to provide that if two or more instruments, be they powers of attorney, enduring powers of attorney or representation agreements, confer, in whole or in part, the same authority on different persons, it shall be presumed that all the instruments are valid, unless there is an express provision to the contrary in or more of the documents or unless a contrary intention may be drawn by necessary implication from all the circumstances.

2. Personal affairs and financial affairs

If the recommendations made here are implemented, a representation agreement may name different representatives for personal and (Section 7) financial affairs; there could be separate agreements for each of these matters, naming different representatives; or the more likely possibility, an enduring power of attorney may name one person as an attorney, an agreement another person to deal with personal affairs.

In these types of situation, a conflict can arise if the person responsible for the principal's personal affairs wishes to do something the person responsible for financial affairs thinks is too

extravagant or cannot be afforded. Few jurisdictions have dealt with the issue. The Ontario Act (s. 32 (1.2)) provides that the wishes of the person responsible for personal affairs prevail, but recognizes that could lead to undesirable expenditure. It therefore goes on to provide that the person responsible for financial affairs is not bound to act on a decision of the person responsible for personal affairs if "the decision's adverse consequences in respect of the ... [principal's] property significantly outweigh the decision's benefits in respect of the ... [principal's] personal care" (s. 32 (1.3)). This is the type of consideration that the parties would take into account in the absence of legislation, it does not give much concrete guidance, and will not do much to help resolve differences.

A better approach may be to work by analogy to the law of trusts. The two people making decisions are co-fiduciaries so far as in substance their spheres of authority overlap. They are expected to act unanimously. If, after making their best efforts, they cannot agree, they should be able to go to court for advice and directions. If there is a clear deadlock this is one of the exceptional situations in which a court might make a decision. Recommendations have already been made on the making of applications for directions by attorneys and representatives.

D. TRANSITIONAL PROVISIONS – ENDURING POWERS OF ATTORNEY

In general the recommendations (2-25) specifically applying to enduring powers of attorney either can be applied to powers that exist at the time any legislation comes into force, or by their nature do not raise any transitional issues. That is not true however of recommendations 4, 6, 9 and 12. As well as dealing with them, it may also be useful to comment on some of the other recommendations.

1. Validity of existing powers: capacity and execution: Recommendations 4, 9

As a general principle, powers that have been validly created before any new legislation comes into force should not be invalidated by anything in the legislation.

Recommendation 4 states the common law on the capacity to create a power. What may be a change is the suggestion in part (2) of the recommendation that it shall be presumed that a person is capable unless the contrary is established. It might be prudent to confirm that the presumption

would apply in all proceedings relating to enduring powers of attorney, even if the power was created before any provision incorporating the presumption came into force.

Recommendation 9 deals with execution of enduring powers. Only one part of the recommendation raises transitional issues. Under Recommendation 9 (3) there will be additional prohibited witnesses. Even if the legislation was silent on the matter, it is extremely unlikely that a court would hold that a power, validly executed before the legislation, became invalid because it did not comply with new execution requirements contained in the legislation. Out of an abundance of caution, it may nonetheless be desirable that the matter be specifically dealt with.

Variation by the donor of an existing power raises slightly different considerations. The *Power of Attorney Act* does not deal with variation of enduring powers of attorney by the donor. Nonetheless, any amendments to the Act should not affect a valid existing variation, however that may have needed to be done. For the future, it would be better to establish the practice of complying with any new legislation in all matters, initial creation or variation, occurring after the legislation comes into force.

RECOMMENDATION 36

The *Power of Attorney Act* should be amended to provide:

(1) The presumption as to capacity referred to in Recommendation 4(2) applies to enduring powers of attorney created before, on or after the day any legislation enacting the presumption comes into force;

(2) Any new provisions on execution apply to the creation of enduring powers of attorney created on or after the day the provisions come into force; and apply to the variation of an enduring power of attorney whether it was created before, on or after that day.

2. Attorneys: Recommendation 6

Section 17 (2) (f) of the *Community Care Facilities Act*, R.S.B.C. 1996, c. 60 prohibits a resident of a facility from appointing certain specified persons as an attorney. Recommendation 6 (1)

recommends that the prohibition be extended to appointments by former residents. Any legislation should not operate retroactively, or it would invalidate a power which was valid at the time of its creation.

RECOMMENDATION 37

> The *Community Care Facilities Act* should be amended to provide that any prohibition on former residents of community care facilities appointing as an attorney under an enduring power any of the persons referred to in section 17 (2) (f) of the *Community Care Facilities Act* should apply only to enduring powers created on or after the day the legislation providing for the prohibition comes into force.

3. Provision for spouses and children: Recommendation 12

Recommendation 12 recommended that an attorney under an enduring power of attorney may make some provision for the spouse and dependant children of the donor. The reason for the recommendation is that it enables attorneys to do what most donors would want to do.

As the law now stands, a donor who wants to give such an authority to an attorney must do so expressly in the power. If that is not done it may be an oversight, but it may be the donor has considered the matter, and for anyone of a number of reasons has decided not to include any such provision. On balance therefore it is probably better that the recommendation not apply to existing powers.

RECOMMENDATION 38

> If Recommendation 12 is implemented, it should apply only to enduring powers of attorney created on or after the day on which the legislation implementing the recommendation comes into force.

4. Other recommendations

Recommendation 8 provides, in general terms, that if one of two or more joint attorneys for any reason ceases to act, the remaining attorney(s) may continue to act. At common law, the

remaining attorneys would lose their authority. It is suggested, however, that no great harm would be done if the recommendation applied to enduring powers that existed when recommendation is implemented. Permitting the power may be as much in accord with the expectations of the donor as would be terminating the authority of the remaining attorneys. And if there is any dissatisfaction with what they do applications may be to remove them or appoint a committee.

Recommendation 14 recommends that some of the core common law and equitable duties of an attorney be set out in legislation. This will not change the law and so there is no reason why any legislation should not apply to existing powers.

It may be useful to comment specifically on one aspect of the recommendation. It is suggested in Recommendation 14 (2) (d) that a different standard of care should apply in the case of unpaid and paid attorneys. It may not be totally clear that this is now the law. A court could well hold that it is. There is therefore nothing unfair to paid attorneys if the provision is applied to existing powers.

Recommendation 15 recommends that subject to a contrary intention in the instruments, an attorney under an enduring power of attorney come under a duty to act if he or she has acted under the power or has otherwise indicated acceptance of the appointment, and has reason to believe that the donor is incapable of managing his or her affairs.

That may be imposing on an attorney a greater obligation than the law would now impose. Nonetheless, the whole point of creating an enduring power of attorney is to have in place an arrangement in the event of incapacity. It is not asking too much to require that an attorney to act in the circumstances provided for in Recommendation 15. Moreover, the attorney has always the option of resigning.

Recommendation 20, in terminating an enduring power on the termination of a marriage or marriage-like relationship, changes the law. Again, however, it is likely to be in line with what most people would have wished had they put their minds to the issue when the power was created, and so it is not objectionable to make it apply to enduring powers created before any amending legislation comes into force.

Recommendation 21 would confer on the court the authority to appoint a replacement attorney if an attorney ceases to act and there is no continuing attorney; Recommendation 22, the authority to appoint a new attorney rather than terminating the power and appointing a committee. This would be a new jurisdiction, but it is suggested it may be safely applied to existing powers. Again it is thought that many donors, if they had considered these matters when creating the power, might well have preferred to leave open the possibility that the power continue with court appointed attorneys rather than in all cases a committee being appointed.

E. TRANSITIONAL PROVISIONS – REPRESENTATION AGREEMENTS

All of the recommendations on representation agreements can be applied to agreements, whether created before or after any legislation implementing the recommendations comes into force, with the exception of recommendations 26 and 27.

1. Recommendation 26

The recommendations made in Recommendation 26 simplify the requirements for the execution of representation agreements. Two questions arise in relation to them.

First, the recommendation simplifies the process of execution. It could never operate to invalidate an existing agreement. Should it, however, operate so as to validate an agreement whose execution did not meet the requirements of the Act as it presently stands, but does meet the requirements of Recommendation 26? Section 39 of the *Representation Agreement Act* provides a precedent for validating pre-existing agreements, though in somewhat different circumstances. Nonetheless, if there is merit in simplifying the execution requirements, there is some justification for validating an agreement that complies with the simplified requirements if it failed originally to meet the complex requirements being replaced. If that were done it, it would of course mean that anything done under the now valid agreement would be deemed to have been legally done.

The issue may not in fact be of major importance, in light of the power of the court to order that an agreement is not invalid simply because of a defect of execution (*Representation Agreement*

Act, ss. 30 (3) (e), 32 (1)). But if the retroactive validation is justifiable, it is probably better to do it by legislation rather than requiring in all cases an application to court.

Second, if an agreement has been validly created before any changes to the execution process, may it be varied using the new process? The same question was discussed in relation to enduring powers, and for the reasons given there, it is suggested the new execution rules should apply.

RECOMMENDATION 39

> If Recommendation 26 be implemented, the *Representation Agreement Act* be further amended to provide with respect to agreements that were made before the legislation implementing the legislation comes into force:
>
> (1) if an agreement was invalid solely because of a defect of execution, it shall be deemed to have been valid from the date of its creation if it would have been validly executed under the process recommended in Recommendation 26;
>
> (2) an agreement may be changed by an instrument validly executed under the process recommended in Recommendation 26, even if the agreement was made before any legislation implementing Recommendation 26 comes into force.

2. Recommendation 27

Recommendation 27, following on Recommendation 1, recommends that all references to financial affairs be deleted from the *Representation Agreement Act*. References that are needed to accommodate the continued existence of section 7 would, however, remain in the Act. In the following discussion a reference to financial matters should be read as not including section 7 agreements.

If Recommendation 27 is implemented, it needs to be decided if representation agreements, created before the law is changed and dealing with financial matters, should continue to be subject to the *Representation Agreement Act* or should now fall under the *Power of Attorney Act*.

There is much to be said for subjecting all instruments dealing with financial affairs to the same rules, and if one were starting totally afresh that would be the obvious thing to do. That objective could be accomplished by deeming all representation agreements dealing with financial affairs to be enduring powers of attorney.

But there are already in existence representation agreements dealing with financial affairs. Those who entered into them had an expectation that the agreements would be governed by the *Representation Agreement Act*. Indeed in some cases a person may have been faced with a choice between an enduring power of attorney and a representation agreement, and selected the latter instrument. Transactions may well have been entered into on that basis. On balance, the better thing to do is to continue to apply the *Representation Agreement Act* to any existing agreements.

RECOMMENDATION 40

> That it be provided in the *Representation Agreement Act* that the Act shall continue to apply to all representation agreements, including those dealing with financial affairs, entered into before any legislation implementing Recommendation 27 comes into force.

F. IMPLEMENTATION PERIOD

If the proposals that are made in the various recommendations are enacted, there seems to be no reason why there should be any great delay in proclaiming the legislation in force.

There are a number of matters which people will have to be aware of in preparing instruments. They include:

(1) Enduring powers of attorney will be the only instrument which can be used in relation to financial affairs (Recommendations 1, 27).

(2) The requirements for execution of enduring powers of attorney will be slightly changed, those for representation agreements considerably simplified (Recommendations 9, 26 and see also Recommendation 39).

(3) There will be a restriction on the appointment of attorneys by former residents of community care facilities (Recommendations 6, 37).

(4) There will be a number of "default" provisions, that is, provisions which will be deemed to be in an instrument, unless excluded (enduring powers of attorney: Recommendations 8, 12 (and see also Recommendation 38), 14, 15, 20(3); representation agreements: Recommendation 28).

In relation to all of these matters, it may be necessary to develop new forms, and any legislation should not, of course, come into force until that is done. However, the proposals are not particularly complex proposals, and it should not take long for those who prepare instruments to become familiar with them, or for forms to be prepared.

The other recommendations either make no change in the law (Recommendations 2, 4, 11), or are recommendations which, without involving any major policy change, are designed to assist in the administration and enforcement of enduring powers of attorney and, to a lesser extent, representation agreements, or in protecting attorneys, representatives or third parties (generally Recommendations 17-34). While it would be desirable to know about these when drafting instruments, a knowledge of them will not be essential in order to draft a valid instrument.

APPENDIX A

TERMS OF REFERENCE
REVIEW OF REPRESENTATION AGREEMENTS AND ENDURING POWERS OF ATTORNEY

Background

Historically, powers of attorney were agency documents not incapacity planning tools. At common law, a power of attorney terminated on the donor's subsequent mental incapacity. The law (s.8 of the *Power of Attorney Act*) was changed in 1978 to permit the creation of an enduring power of attorney. This instrument, unlike a regular Power or Attorney, is intended to remain in effect even if the grantor loses capacity. Persons given authority to act under a general enduring power of attorney can exercise broad control over the grantor's assets. However, an enduring power of attorney cannot give someone authority to make personal or health care decisions.

When the *Representation Agreement Act* was passed in 1993, the original intent was that enduring powers of attorney would be abolished through the repeal of section 8 of the *Power of Attorney Act* at the same time as the *Representation Agreement Act* was proclaimed. Amendments in 1999 permitted a transition period to allow for a time when either document could be made. The repeal of s.8 of the *Power of Attorney Act* has been problematic in the face of criticism of the *Representation Agreement Act*. The government has made 3 announcements regarding the repeal:

- June 1999 announcing a repeal of September 2000
- June 2000 announcing a repeal of September 2001
- April 2001 announcing a repeal of September 20002

The 2001 amendments to the *Representation Agreement act* will come into force on September 1, 2001. This provides a one year transition period.

Issues and Analysis

Representation agreements are broader in scope than enduring powers of attorney. For instance, representation agreements allow a person to name someone to make personal and health care decisions on their behalf. Representation agreements give adults making the agreement considerable scope to customize their agreements, and they provide safeguards to attempt to protect individuals from financial abuse. These safeguards are not present with enduring powers of attorney.

These and other advantages are among the reasons that representation agreements are strongly endorsed by a broad range of community and advocacy groups, especially those that deal with elderly and/or vulnerable adults.

By contrast, the Representation Agreement Subcommittee of the Canadian Bar Association has expressed concern that the safeguards are too restrictive and too little is known about certain aspects of representation agreements to abolish powers of attorney even as of September 2002.

Despite approximately 50 amendments to the *Representation Agreement Act*, some concern remains in the bar about the abolition of enduring powers of attorney. Among the concerns are:

- the test of incapability for limited agreements remains vague
- the cost of representation agreements attributable in part to the execution requirements

The ability to name a proxy decision-maker for health care has generally been welcomed. It is planning for property management that has been contentious.

The fundamental policy issue is whether the two schemes should co-exist in the long term or whether the representation agreement should be the only scheme.

Government's priority is that the law provides British Columbians with the best possible ability to plan for management of their finances and property upon incapability. British Columbians should have affordable planning instruments with appropriate safeguards.

Schedule A - Terms of Reference for Review

Undertake consultations with community advocacy groups, third parties relying on authority of these legal instruments, and professional associations.

Consider research and reports developed to date respecting representation agreements and enduring powers of attorney, including the legal framework and research in other jurisdictions.

Make recommendations on the future of representation agreements and enduring powers of attorney in relation to finances and property management on behalf of incapable adults.

- Particularly, should there be one or two legal instruments available to BC adults.
    - If it is recommended that representation agreements be the only instruments, should there be any changes in the legislation relating to them.
    - If it is recommended that there be both representation agreements and enduring powers of attorney, should there be any changes in the legislation relating to them.

What changes should be made to the law to give effect to these recommendations, including issues related to existing legally executed documents.

What is an appropriate implementation period for any recommended transition.

Submit report by December 31, 2001.

APPENDIX B

ORGANIZATIONS AND INDIVIDUALS

Community Organizations

- Alzheimer's Society of B.C.
- BC Association for Community Living
- BC Coalition for the Elimination of Abuse of Seniors
- BC Coalition for People with Disabilities
- Canada's Association for the Fifty-Plus
- Community Coalition for the Implementation of Adult Guardianship Legislation
- Representation Agreement Resource Centre

Government Bodies

- Land Titles Office, Catherine M. Greenall, Registrar, New Westminster Land Title Office
- Public Guardian and Trustee
- Seniors' Advisory Council of BC (Individual Members)

Professional Associations

- Canadian Bar Association,
  - Representation Agreement Review Sub-Committee
  - Wills and Estates Sub-Section, Victoria
- Law Society of British Columbia
- Society of Notaries Public of British Columbia

Other Organizations

- Canadian Bankers' Association
- Canadian Life and Health Insurance Association (David W. McCulloch)
- Credit Union Central

Individuals

- Amyot, Richard B., Lawyer
- Barnett, Francis S.M., Lawyer
- Clements, Gerrit, Ministry of Health
- Gordon, Dr. Rob, Simon Fraser University
- Hogarth, Dr. John, University of British Columbia
- Lewis, Geoffrey, Lawyer
- Magnusson, Ruth, Lawyer
- Ridgway, QC, G. Glen, Lawyer